announced, is an efficient means of administering PTFP funds.

NTIA proposes to treat broadcast "improvement" and "augmentation" projects as "replacement" projects that normally are supported only at the 50% Federal funding level. NTIA believes that this addition is consistent with the existing policy and allows for more equitable treatment of applications. Again a showing of extraordinary need for an emergency situation will be taken into consideration as justification for grants of up to 75% of the project cost.

As a related matter, NTIA also takes this opportunity to reaffirm its existing policy on the use of Corporation for Public Broadcasting (CPB) funds to meet the local matching requirements of the PTFP grant. [Section 392(b), Rules 2301.16(a)(2)]. As previously announced, CPB grants are not considered "funds supplied by Federal departments and agencies" within the meaning of the Rules and therefore there is no absolute proscription against the use of such CPB grants. [Rules 2301.16 and 44 FR 30,898 at 30,907 (1979)].

However, NTIA continues to believe that the policies and purposes underlying the PTFP requirements could be significantly frustrated if applicants routinely relied upon another federally supported grant program for its local match. Accordingly, NTIA has limited the use of CPB funds for the non-Federal share of PTFP projects to circumstances of "clear and compelling need." [Rules 2301.16(a)(4)]. It intends to maintain that standard and to apply it on a case-by-case basis in future years.

Public Comment Period and Other Information. The PTFP policy statement is exempt from the notice and comment requirements by section 553(b)(A) of the Administrative Procedures Act [5 U.S.C. 553 (b)(A)]; it may be made effective immediately upon publication in the Federal Register under 5 U.S.C. 553 (d)(2). However, NTIA believes the public interest will be best served by accepting comments by the deadline specified above under the heading DATES and by issuing a final policy statement based on evaluation of those comments.

Under Executive Order (E.O.) 12291, the Department must determine whether a regulation is a "major" rule within the meaning of section 1 of E.O. 12291 and therefore subject to the requirement that a Regulatory Impact Analysis be performed. This policy statement is not a major rule because it is not "likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries * * *; or (3) significant adverse effects on competition, employment, investment, productivity or innovation * * *." Therefore, preparation of a Regulatory Impact Analysis is not required.

The Regulatory Flexibility Act [5 U.S.C. 601 *et seq.*] does not apply to this proposed policy statement, because, as explained above, the proposed policy statement was not required to be promulgated as a proposed policy statement before issuance as a Final Policy Statement by section 553 of the Administrative Procedures Act [5 U.S.C. 553] or by any other law or regulation. Neither an initial nor final Regulatory Flexibility Analysis was prepared. This proposed rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

The Office of Management and Budget has approved the information collection requirements contained in this policy statement pursuant to the Paperwork Reduction Act under OMB Control No. 0660–0003.

Dated: August 5, 1991.

Janice Obuchowski,

Assistant Secretary for Communications and Information.

[FR Doc. 91–18849 Filed 8–8–91; 8:45 am]

BILLING CODE 3510–60–M

DEPARTMENT OF COMMERCE

15 CFR Part 2301

[Docket No. 91–0636–1136]

Public Telecommunications Facilities Program

AGENCY: National Telecommunications and Information Administration (NTIA), Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: The National Telecommunications and Information Administration (NTIA) is issuing a Notice of Proposed Rulemaking. This Notice is issued to clarify and/or revise the rules and appendix governing administration of the Public Telecommunications Facilities Program (PTFP). Applicant guidelines are clarified or revised under the headings of Priorities, Catastrophic Damage, Additional Information for Applications, Withdrawals and Deferrals, Appropriate Applicant/PTFP Contact, Filing of FCC Applications, Support for Salary Expenses, Premature Obligation of Non-Federal Funds, and Assurances. Grantee responsibilities are clarified under the headings Site Right Documentation and Administration of Federal Grant Funds and Control and Use of Facilities. This action is undertaken to eliminate uncertainty about PTFP requirements.

In a separate Proposal to Issue Further Statement of Program Policy, NTIA provides guidance to PTFP grant applicants on various funding considerations relating to three types of project categories. The proposed policy statement appears as a separate document in this issue of the Federal Register.

DATES: Comments must be submitted on or before September 9, 1991.

ADDRESSES: Persons interested in commenting on these proposed policies and rules must send three copies of any comments to: Office of the Chief Counsel, NTIA/DOC, 14th Street and Constitution Avenue NW., room H–4713, Washington, DC 20230, Attention: Brian E. Harris.

FOR FURTHER INFORMATION CONTACT: Dennis R. Connors, Director, Public Telecommunications Facilities Program, NTIA/DOC, 14th Street and Constitution Avenue NW., room H–4625, Washington, DC 20230; telephone: (202) 377–1835.

SUPPLEMENTARY INFORMATION:

1. Notice is hereby given of proposed rulemaking in the above matter.

2. The National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce (DOC), is charged with the administration of the Public Telecommunications Facilities Program (PTFP). PTFP's primary objective is to "assist, through matching grants, in the planning and construction of public telecommunications facilities in order to * * * extend delivery of public telecommunications services to as many citizens of the United States as possible by the most economical and efficient means * * *, increase public telecommunications services and facilities available to, operated by, and owned by minorities and women; and strengthen the capability of existing public television and radio stations * * *."[1]

3. The Secretary of Commerce is charged with the establishment of rules necessary to carry out the PTFP's objectives, including rules relating to the order of Priority in approving construction projects and the amount for each grant. [section 392(e)]. The purpose of this proceeding is to clarify and revise the rules and appendix governing administration of the PTFP. NTIA hopes

[1] 47 U.S.C. 390 (1)–(3). The Communications Act of 1934, as amended (1988). Unless otherwise noted, all statutory cites are to title 47 of the United States Code. PTFP Rules are set out at 15 CFR part 2301 (1989). [Hereinafter Rules 2301.]

that this proceeding will give applicants a clearer understanding of the types of projects PTFP is most likely to fund, and given grantees a better understanding of their responsibilities upon receipt of a grant.

4. The clarifications and revisions may be broken into two broad categories, Applicant Guidelines and Grantee Responsibilities. Clarifications or revisions for Applicant Guidelines are proposed under the following headings—Priorities, Catastrophic Damage, Additional Information for Applications, Withdrawals and Deferrals, Appropriate Applicant/PTFP Contact, Filing of FCC Applications, Support for Salary Expenses, Premature Obligation of Non-Federal Funds, and Assurances. Clarifications or revisions of Grantee responsibilities are proposed under the headings Site Right Documentation and Administration of Federal Grant Funds and Control and Use of Facilities.

5. NTIA hopes that the public comments received on the various matters set out below will help in clarifying the revising PTFP Rules and Priorities. NTIA is also receptive to comments suggesting additional areas where clarification or revision would be beneficial to grantees and applicants.

Applicant Guidelines

A. Funding Priorities

6. PTFP's funding Priorities, listed in the Rules, at the Appendix, have reflected NTIA's perception of its original authorizing legislation. [sections 390–393, 397] NTIA believes that it is desirable to revisit the Priorities in light of changing conditions to ensure that they continue to reflect legislative intent. In doing so, NTIA has tentatively determined that it is appropriate to accord higher status to some types of projects within the present Priorities, to adjust the Priorities of other types of projects, and to end the policy of considering cable television coverage when evaluating television activation projects.

NTIA proposes, therefore, the following specific changes:

7. Priority 1B—Deletion of the reference in the present rules to "cable penetration" in the criteria used to determine the priority of television station activations. Since cable companies are no longer subject to Federal Communications Commission (FCC) "must carry" rules [47 CFR 76.57–76.61 (1986)], the availability of cable and its penetration in a community are no longer necessarily relevant to determining whether a community has public television available to it.

8. Priority 1C—Creation of a new subcategory to enable NTIA to assign Priority 1 status to applications from noncommercial radio stations for receive-only satellite earth stations (downlinks) when such a downlink would bring satellite-distributed public radio programming to the applicant's service area for the first time. NTIA considers such projects to be clearly in the spirit of the PTFP's highest Priority and notes that such projects will extend nationally-distributed programming to areas of the country presently unable to hear such programming.

9. In part, this proposal is a response to the recommendations contained in the January 1990 report of the Public Radio Expansion Task Force [2], on which NTIA was represented. In addition, NTIA sees this proposal as assisting the efforts of the Corporation for Public Broadcasting (CPB) to upgrade small public radio stations because it will enable some of them to improve their circumstances to the point that they become eligible for CPB-awarded Community Service Grants. By giving them access to vast amounts of diversified programming, the downlinks may ease their operational costs, improve their standing in the community, and result in increased donations, expanded underwriting, and generally greater financial stability and independence. NTIA also hopes that this change will materially assist Native American and minority stations in bringing their listeners specialized programming available only by satellite.

10. Priority 2—Clarification of the criteria for Priority 2 by expressly including "urgency" in the discussion of funding considerations. "Urgency of acquisition or replacement" is a fundamental criterion in evaluating such applications, and is explicitly included in the Rules governing funding criteria. [Rules 2301.13(d)(3)] For consistency, NTIA believes that the concept should be reflected in the Appendix discussion of Priority 2.

11. Priority 4—Creation of two subcategories within Priority 4. In order to improve the processing of the large number of applications, NTIA proposes to divide Priority 4 into two sub-categories. Priority 4A is for four types of projects that NTIA thinks should receive enhanced emphasis. The first type is projects for the purchase of urgently needed replacement equipment for stations that cannot qualify for a Priority 2, *i.e.*, stations providing either the only public telecommunications signal or the only locally originated public telecommunications signal to a geographic area.

12. This subcategory also includes projects to replace or improve equipment at stations that produce a high percentage of the public television and public radio programming that is distributed nationally. In accordance such projects somewhat higher status, NTIA wishes to recognize the important place that these relatively few stations occupy in the national system.

13. NTIA further proposes to extend Priority 4A status to applications for downlinks from radio stations in areas already served by one or more full-service public radio stations if the applicant demonstrates that it would use the downlink to provide its listeners with a program service that does not duplicate the public radio service(s) already available in its area. As with Priority 1C, this action responds to recommendations of the Public Radio Expansion Task Force by enlarging the program offerings of more stations nationwide and increasing the variety of public radio services available to the general public.

14. Priority 4A is also reserved for projects involving public broadcasting stations that, sometime in the preceding five years, have gone on the air without PTFP support and with a complement of equipment well short of what PTFP considers to be basic for effective operation. This type of project will permit such stations to acquire additional basic equipment so as to allow them to offer a higher quality public broadcasting service to the community.

15. In addition, NTIA proposes to create within Priority 4 subcategory 4B. Into this subcategory would fall applications for the improvement and non-urgent replacement of equipment at any public broadcasting station for projects that do not qualify for 4A status. Priority 4B is also for applications to activate public broadcast stations in areas already served by a station or stations with local origination capability, when the proposed stations would not merit substantial Special Consideration because of significant participation by minorities or women. (The latter applications will continue to be assigned to the Special Applications category.) At present, all such activation projects are considered to be Special Applications. NTIA intends to move most of them—*i.e.*, all without notable minority/women participation—to this subcategory so as to concentrate virtually all broadcast projects in the formal Priorities. This reserves the

[2] Public Radio in the 1990s: Fulfilling the Promise, The Report of the Public Radio Expansion Task Force, Dale K. Ouzts, Chairman, January 1990.

Special Applications category almost entirely for nonbroadcast and highly specialized broadcast applications.

B. Catastrophic Damage

16. NTIA wishes to be able to give timely assistance to public broadcast stations that suffer catastrophic damage from natural or manmade causes and need assistance in the replacement of their equipment so as to return to the air and restore public telecommunications services to their communities. Procedures are outlined to enable PTFP to accept applications for such purposes outside of the normal application review cycle. [Rules, 2301.5(g)]

C. Additional Information for Applications

17. To expedite its evaluations of applications, NTIA proposes to eliminate the 45-day period after the closing date during which applicants have been permitted to submit additional information concerning their applications and to make minor changes in the applications. This practice delayed PTFP review of applications by nearly six weeks. Most deficiencies that had to be corrected were quite minor and did not warrant the formal 45-day period. Moreover, the presence of this period clearly encouraged some applicants to regard the closing date as merely an interim deadline, with the "real" deadline being the end of the 45-day period.

18. NTIA retains its ability to request additional information form applicants and establishes a 15-day deadline for applicant response. [Rules 2301.6(a)] In addition, NTIA requires applicants to provide information concerning changes in the status of material information critical to funding decisions whenever such changes occur. [Rules 2301.6(b)] To provide applicants time to adjust to the elimination of the 45-day period, the closing date for FY 1992 applications will be moved somewhat later; *e.g.*, it might be set for January 31, 1992, rather than, as has been customary recently, towards the middle of January.

D. Withdrawals and Deferrals of Applications

19. Previously the rules made no provision for an applicant to withdraw an application, although NTIA traditionally has permitted this to be done. NTIA believes that it is desirable to provide explicitly in the Rules for the formal withdrawal of an application to take place, without affecting future funding decisions. [Rules 2301.9(g)(1)]

20. NTIA also proposes that applicant requests for application deferral be treated as requests for withdrawal and the application returned to the applicant. [Rules 2301.9(g)-(2)] In the past, applicants have occasionally submitted applications and then asked that they be deferred to the next grant cycle. Such requests can be used to gain competitive advantage before the FCC, and the situation lent itself to potential abuse of the spirit of PTFP procedures. The new Rule will not alter the current practice of applications being automatically deferred by NTIA if they are not funded, and applicants may reactivate the deferred applications in the next grant cycle.

21. Finally, NTIA wishes to limit the number of times a deferred application may be reactivated. [Rules 2301.9(h)] NTIA intends to allow only two reactivations of an application. Some applicants have reactivated deferred applications for three, four, or more years. If the application calls for the replacement of equipment, repeated deferrals over a period of years raise a question about the urgency of the need. NTIA believes that after three years of consideration the applicant should reevaluate its commitment to the project and the cogency of its argument in favor of the project. If, after such a reevaluation, an applicant desires to resubmit a proposal, a new application must be submitted and it will be considered as such by PTFP.

E. Appropriate Applicant/PTFP Contacts

22. As a publicly funded discretionary grant program, NTIA must follow procedures that are fair and impartial to all applicants. It seeks, therefore, to avoid the appearance of impropriety that might result from certain seemingly innocent contacts between NTIA/PTFP and applicants, and proposes to incorporate into the Rules a statement formalizing its guidelines on the topic. [Rules § 2301.15(f)] In particular, in order to maintain the integrity of the application review process, NTIA/PTFP staff are not authorized to discuss the merits of an application when it is under review. However, some contacts during the grant review cycle are appropriate, and they are likewise indicated in the Rules. This addition formalizes a policy statement previously distributed to all 1991 applicants.

F. Filing of FCC Applications

23. The Rules stipulate at § 2301.8(a) that, "Each applicant whose project requires FCC authorization must file an application for that authorization on or before the closing date." If the applicant does not file an application with the FCC, or if the FCC application is dismissed, returned, or denied, NTIA may return the application submitted to PTFP. [Rules 2301.8(f) *and* 2301.9(f)]

24. The primary purpose of the requirement is to ensure that the FCC has ample time in which to review the applications and to notify PTFP whether any necessary authorizations for the project will be issued. NTIA requires grantees to begin construction projects promptly and, therefore, does not award funds for projects that may be long-delayed due to difficulties in obtaining proper FCC authorization. Applications that are delayed in obtaining FCC authorizations are deferred for consideration in the next grant cycle.

25. A second purpose of the requirement is to provide NTIA with appropriate technical documentation with which to evaluate requests for equipment. NTIA recognizes that the FCC now accepts applications for some facilities, such as low power television stations and television translators, only during specified periods of the year. Since NTIA does not control the scheduling of these FCC "windows", it will accept and process grant applications for television translators and low power television facilities before the FCC applications are filed, provided that the PTFP application includes a copy of the application that will be filed at the FCC when the "window" opens. [Rules 2301.8(b)]

26. In addition, ancillary authorizations such as for Studio-Transmitter Links (STLs) and remote pick-up units are closely associated with a station's main authorization and are routinely granted by the FCC. Therefore, NTIA will no longer require that FCC applications for this equipment be filed by the closing date. PTFP, however, requires technical information about the related equipment for its review, and NTIA will require that copies of STL applications as they will be filed at the FCC be included in the PTFP application submitted by the closing date.

27. Similarly, in the cases of C-band downlink facilities and of Very Small Aperture Terminals (VSATs) NTIA will no longer require that the relevant FCC applications be filed at the FCC on or before the PTFP closing date. Two factors have shaped NTIA's decision. First, the technical parameters of both C-band downlinks and VSATs are well established and PTFP can review the grant applications without having the pertinent FCC filings on hand. Second, the FCC does not require licensing of C-band downlinks and its licensing of VSATs has become routine. Although NTIA is relaxing its FCC filing requirement for these facilities, NTIA will continue to require FCC licensing of

both C-band downlinks and VSATs in order to fully protect the Federal interest in the equipment.

28. NTIA emphasizes that, if a PTFP grant is eventually awarded to help purchase the facilities contemplated here, it will require receipt of copies of the FCC authorizations prior to the release of Federal funds to the grantee.

G. Support for Salary Expenses

29. NTIA wishes to clarify its policy concerning the support of salary expenses for construction projects. NTIA regards its primary mandate to be funding the acquisition of equipment and only secondarily the funding of salary expenses, even when allowed by law. Moreover, NTIA notes that competition for PTFP funding remains intense. To ensure that PTFP monies are distributed as effectively as possible in this competitive atmosphere, NTIA must weigh carefully its support for any project cost not directly involved with the purchase of equipment.

30. Therefore, as has been the policy for the past few years, NTIA proposes generally not to fund salary expenses, including staff installation costs, pre-application legal and engineering fees, and pre-operational expenses of new entities. NTIA will support such costs only when the applicant demonstrates that exceptional need exists or that substantially greater efficiency would result from the use of staff installation instead of contractor installation. [Rules 2301.17(b)(3)]

31. As regards the installation of transmission equipment, NTIA strongly favors the use of either manufacturer or professional contractor personnel and commonly funds these costs. NTIA believes that the value of transmission equipment and the complicated nature of its installation require expertise beyond that normally found on station staffs. NTIA will rarely support requests for assistance for the installation of studio and test equipment, however, whether that installation is by staff or by contract employees. Such installation is normally of minimum difficulty, and the associated installation costs should be absorbed in the recipient's normal operating budget. Again, NTIA will take into account demonstrations of exceptional need.

H. Premature Obligation of Non-Federal Funds

32. NTIA wishes to remove an inconsistency in the rule on the premature obligation of non-Federal funds. The subject is addressed twice in the existing Rules, and two different dates are identified as the permissible point for applicant obligation of funds. The first stipulated what an applicant may do "after the filing of its application"; the second referred to "the closing date." [Rules 2301.16(a)(3)(c)] Since these can be markedly different dates, the revision removes the ambiguity by using the phrase "the closing date" in both places.

33. NTIA thinks that clarifying the date by which applicants may obligate non-Federal funds could substantially reduce the possibility of an applicant's inadvertently violating the rule.

I. Assurances

34. Changes in the law since the 1987 Rules revision require NTIA to add two further requirements to the list of applicant Assurances in its Rules and application. [Rules, § 2301.5] First, applicants must promise to maintain a drug-free workplace. [15 CFR 26.600–630 (1990)] Second, they must certify that no Federally appropriated funds have been paid to a Federal employee to influence the award of a grant. [31 U.S.C. 1352 (1988)] Language reflecting these requirements is included in the new rules. [Rules 2301.5(d)(2)(xx)] Because these are obligations imposed by law, no public comment is sought on this addition to the Rules.

Grantee Responsibilities

J. Site Rights Documentation

35. NTIA recently revised its requirements pertaining to documentation of leases and site rights for PTFP projects. NTIA believes that an attorney who is familiar with the local laws should review this aspect of a grantee's documentation. Accordingly, the program now usually requires only an opinion letter containing PTFP-specified certifications and signed by the grant recipient's attorney. The change formalizes the procedure instituted in 1990. [Rules 2301.5(d)(2)(ix)]

K. Administration of Federal Grant Funds and Control and Use of Facilities

36. In 1987, when the PTFP Rules were last revised, some sections were deleted in an effort to simplify the rules. Experience in administering PTFP grants since then indicates the desirability of reinserting some of the deleted sections. This action places all of PTFP's rules and requirements in one convenient document, and NTIA believes that reinserting these rules will assist applicants, PTFP staff, and grant recipients. NTIA welcomes public comment on these rules, in particular whether they will serve the intended purpose of facilitating administration of PTFP grants.

37. The first item of reinserted material requires applicants to make copies of their applications available at their offices for public inspection during normal business hours. [Rules 2301.11(a)] The second states the method by which the final total project cost shall be calculated. [Rules 2301.16(d)] It is needed to give grant recipients a comprehensive understanding of the administration of their awards. The other reinserted sections are explained below:

- *§ 2301.18—Payment of the Federal Grant* was reinserted to conform the PTFP Rules to OMB Circular A–110, Attachment I, ¶7.
- *§ 2301.19—Retention of Records* will help NTIA protect the 10-year Federal reversionary interest created by § 392(g).
- *§ 2301.20—Completion of Projects* and *§ 2301.21, Annual Status Report for Construction Projects* are reinserted to give grant recipients guidance in writing their status and final reports and to help NTIA ascertain that the grant funds are being used for their intended purposes.
- *§ 2301.22—Conditions Attached to the Federal Grant* sets out grant conditions that are unique to PTFP. The award document *incorporates* the Uniform Administrative Requirements of OMB Circular A–110 and 15 CFR part 24.
- *§ 2301.23—Grant Suspensions, Terminations, and Transfers* are reinserted to give applicants and grantees notice of PTFP grant suspension, termination and transfer procedures.
- *§ 2301.24—Equipment* ensures that federal funds are used to provide the highest quality service possible.

38. Some revisions have been made in the reinserted sections. They are minor, reflecting changes in the relevant PTFP guidelines or elaborations of points that NTIA decided needed clarification.

Public Comment Period and Rulemaking Requirements

The PTFP Rules described above relate to a Federal grant-in-aid program; thus, under section 553(a)(2) of the Administrative Procedures Act [5 U.S.C. section 553(a)(2)], they may be issued and made effective immediately without notice of proposed rulemaking, opportunity for comment, or 30-day deferral of effectiveness after publication. However, NTIA believes the public interest will be best served by accepting comments by the deadline specified above under the heading **DATES** and by issuing Final Rules based on evaluation of those comments.

Under Executive Order (E.O.) 12291, the Department must determine whether a regulation is a "major" rule within the meaning of section 1 of E.O. 12291 and therefore subject to the requirement that a Regulatory Impact Analysis be performed. This regulation is not a major rule because it is not "likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumer, individual industries * * *; or (3) significant adverse effects on competition, employment, investment, productivity or innovation * * *." Therefore, preparation of a Regulatory Impact Analysis is not required.

A Regulatory Flexibility Analysis is not required under The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), because as explained above, the rules were not required to be promulgated as proposed rules before issuance as final rules by § 553 of the Administrative Procedures Act (5 U.S.C. 553) or by any other law. This proposed rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

The Department has determined that this rule will not significantly affect the quality of the human environment. Therefore, no draft or final Environmental Impact Statement has been or will be prepared.

The Office of Management and Budget has approved the information collection requirements contained in this rule pursuant to the Paperwork Reduction Act under OMB Control No. 0660-0003.

List of Subjects in 15 CFR Part 2301

Administrative practice and procedure, Grant programs—communications, Telecommunications.

Dated: August 5, 1991.

Janice Obuchowski,

Administrator.

For the reasons set out above, it is proposed to amend 15 CFR chapter XXIII by revising Part 2301 to read as follows:

PART 2301—PUBLIC TELECOMMUNICATIONS FACILITIES PROGRAM

Subpart A—Definitions, Program Purposes and Special Consideration

Sec.

Subpart B—Eligibility and Application Procedures

Subpart C—Federal Financial Participation

Subpart D—Accountability for Federal Funds

Subpart E—Control and Use of Facilities

Subpart F—Waivers

Appendix to Part 2301—Special Application and Priorities

Authority: Public Telecommunications Financing Act of 1978, Pub. L. 95-567, 92 Stat. 2405, codified at 47 U.S.C. 390-394, 397-399b; and the Public Broadcasting Amendments Act of 1981, Pub. L. 97-35, 95 Stat. 725, and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, 5001, 100 Stat. 82, 117 (1986).

Subpart A—Definitions, Program Purposes and Special Consideration

§ 2301.1 Definitions.

Act means Part IV of Title III of the Communications Act of 1934, 47 U.S.C. 390-394 and 397-399b, as amended.

Administrator means the Assistant Secretary for Communications and Information of the United States Department of Commerce.

Agency means the National Telecommunications and Information Administration of the United States Department of Commerce.

Broadcast means the distribution of electronic signals to the public at large using television (VHF or UHF) or radio (AM or FM) technologies.

Construction (as applied to public telecommunications facilities) means acquisition (including acquisition by lease), installation, and improvement of public telecommunications facilities and preparatory steps incidental to any such acquisition, installation or improvement.

Department means the United States Department of Commerce.

FCC means the Federal Communications Commission.

Federal interest period means the period of time during which the Federal Government retains a reversionary interest in all facilities constructed with Federal grant funds. This period begins with the purchase of the facilities and continues for ten (10) years after the official completion date of the project.

Nonbroadcast means the distribution of electronic signals by a means other than broadcast technologies. Examples of nonbroadcast are Instructional Television Fixed Service (ITFS), teletext, and cable.

Noncommercial educational broadcast station or "public broadcast station" means a television or radio broadcast station that is eligible to be licensed by the FCC as a noncommercial educational radio or television broadcast station and that is owned (controlled) and operated by a state, a political or special purpose subdivision of a state, public agency or nonprofit private foundation, corporation, institution, or association, or owned (controlled) and operated by a municipality and transmits only noncommercial educational, cultural or instructional programs.

Noncommercial telecommunications entity means any enterprise that is owned (controlled) and operated by a state, a political or special purpose subdivision of a state, a public agency, or a nonprofit private foundation, corporation, institution, or association; and that has been organized primarily for the purpose of disseminating audio or video noncommercial educational, cultural or instructional programs to the public by means other than a primary television or radio broadcast station, including, but not limited to, coaxial cable, optical fiber, broadcast translators, cassettes, discs, satellite, microwave or laser transmission.

Non-Federal financial support means the total value of cash and the fair market value of property and services received.

(1) As gifts, grants, bequests, donations, or other contributions for the construction or operation of noncommercial educational broadcast stations, or for the production, acquisition, distribution, or dissemination of educational, cultural or instructional television or radio programs, and related activities, from any source other than (i) the United States or any agency or instrumentality

of the United States; or (ii) any public broadcasting entity; or,

(2) As gifts, grants, donations, contributions, or payments from any State, or any educational institution, for the construction or operation of noncommercial educational broadcast stations or for the production, acquisition, distribution, or dissemination of educational, cultural or instructional television or radio programs, or payments in exchange for services or materials with respect to the provision of educational, cultural or instructional television or radio programs.

Nonprofit (as applied to any foundation, corporation, institution or association) means a foundation, corporation, institution, or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

Operational cost means those approved costs incurred in the operation of an entity or station such as overhead labor, material, contracted services (such as building or equipment maintenance), including capital outlay and debt service.

Pre-operational expenses means all nonconstruction costs incurred by new public telecommunications entities before the date on which they began providing service to the public, and all nonconstruction costs associated with the expansion of existing stations before the date on which such expanded capacity is activated, except that such expenses shall not include any portion of the salaries of any personnel employed by an operating public telecommunications entity.

PTFP means the Public Telecommunications Facilities Program, which is administered by the Agency.

PTFP Director means the Agency employee who recommends final action on public telecommunications facilities applications grants to the Administrator.

Public telecommunications entity means any enterprise which is a public broadcast station or noncommercial telecommunications entity and which disseminates public telecommunication services to the public.

Public telecommunications facilities means apparatus necessary for production, interconnection, captioning, broadcast, or other distribution of programming, including but not limited to studio equipment, cameras, microphones, audio and video storage or processors and switchers, terminal equipment, towers, antennas, transmitters, remote control equipment, transmission line, translators, microwave equipment, mobile equipment, satellite communications equipment, instructional television fixed service equipment, subsidiary communications authorization transmitting and receiving equipment, cable television equipment, optical fiber communications equipment and other means of transmitting, emitting, storing, and receiving images and sounds or information, except that such term does not include the buildings to house such apparatus (other than small equipment shelters that are part of satellite earth stations, translators, microwave interconnection facilities, and similar facilities).

Public telecommunications services means noncommercial educational and cultural radio and television programs, and related noncommercial instructional or informational material that may be transmitted by means of electronic communications. It does not include essentially sectarian programming.

Sectarian means that which has the purpose or function of advancing or propagating a religious belief.

State includes each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

System of public telecommunications entities means any combination of public telecommunications entities acting cooperatively to produce, acquire or distribute programs, or to undertake related activities.

§ 2301.2 Program purposes.

(a) The Agency's determination to fund an application and the amount of the grant awarded shall be governed by whether the application will, in the following order of priority, result in:

(1) The establishment of new public telecommunications facilities to extend services to areas not currently receiving such services;

(2) The expansion of the service areas of existing public telecommunications entities; or,

(3) The improvement of the capabilities of existing licensed public broadcasting stations to provide public telecommunications services.

(b) Notwithstanding paragraph (a) of this section, the Agency may award a grant to an applicant which is otherwise eligible for funding, but whose proposal does not specifically meet any of the purposes enumerated above. Such grant, however, must fulfill the overall objectives of the Act.

§ 2301.3 Special consideration.

In accordance with Section 392(f) of the Act, the Agency will give special consideration to applications that foster ownership or control of, operation of, and participation in public telecommunications entities by minorities and women. The Agency interprets "ownership" and "owned" as meaning control of an entity through the possession or exercise of the normal incidents of ownership, such as participation on the governing board or holding corporate offices. The Agency will accord special consideration only where women and/or minorities hold more than fifty (50) percent control of the applicant. The Agency will consider the composition of the applicant's governing body, management levels, or policy-making positions.

Subpart B—Eligibility and Application Procedures

§ 2301.4 Eligible organizations and projects.

(a) *Eligible applicants (Construction Grants).* In order to apply for and receive a PTFP Construction Grant, an applicant must be:

(1) A public or noncommercial educational broadcast station;

(2) A noncommercial telecommunications entity;

(3) A system of public telecommunications entities;

(4) A nonprofit foundation, corporation, institution, or association organized primarily for educational or cultural purposes; or,

(5) A state or local government or agency, or a political or special purpose subdivision of a state.

(b) *Eligible applicants (Planning Grants).* In order to apply for and receive a PTFP Planning Grant, an applicant must be:

(1) Any of the organizations described in paragraph (a) of this section; or,

(2) A nonprofit foundation, corporation, institution, or association organized for any purpose except primarily religious.

(c) *Eligible projects.* An applicant that is eligible under paragraph (a) or (b) of this section may file an application with the Agency for a planning or construction grant to achieve the following:

(1) The provision of new public telecommunications facilities to extend service to areas currently not receiving public telecommunications services;

(2) The expansion of the service areas of existing public telecommunications entities;

(3) The establishment of new public telecommunications entities serving areas currently receiving public telecommunications services; or,

(4) The improvement of the capabilities of existing licensed public broadcast stations to provide public telecommunications services.

(d) Applicants must certify whether they are delinquent on any Federal debt. In accordance with OMB Circular A–129, an applicant with outstanding accounts receivable with any agency of the Federal Government will not receive an NTIA grant until the debt is paid or arrangements to repay which are satisfactory to the government agency in question are made. This includes debts incurred by sub-units of the applicant other than the sub-unit that is applying to NTIA, and includes debts owed to any agency of the Federal Government, not just to the Department of NTIA.

(e) An applicant whose proposal requires an authorization from the FCC must be eligible to receive such authorization.

(f) *Preliminary determination of eligibility.* In order to obtain a preliminary determination of applicant or proposal eligibility, a prospective applicant must send a letter requesting such determination to the Agency.

(1) The request letter should be addressed to: PTFP Director, NTIA/DOC, 14th Street and Constitution Avenue, NW., room H–4625, Washington, DC 20230.

(2) In the request letter the prospective applicant must:

(i) Describe the proposed project;

(ii) Include a copy of the organization's articles of incorporation and bylaws, or other similar documentation, which specifies the nature and powers of the prospective applicant (unless the prospective applicant has received a PTFP grant within the last ten (10) years, in which case only a copy of the most recent Annual Report or Quarterly Performance Report and any changes in the articles of incorporation and bylaws since the last grant must be provided); and,

(iii) If the prospective applicant is a nonprofit foundation, corporation, institution, or association which has not received a PTFP grant within the previous ten (10) years, provide a copy of a letter from the Internal Revenue Service granting the prospective applicant tax exempt status under section 501(c)(3) of the Internal Revenue Code, or other legal documentation of nonprofit status.

(3) A favorable preliminary determination of eligibility does not guarantee that the Agency will accept a future application for filing or award a subsequent grant.

(4) A prospective applicant may appeal an unfavorable preliminary determination of eligibility to the Administrator under § 2301.10.

§ 2301.5 Application procedures.

(a) *Address.* The following address should be used for all communications with the Agency: Public Telecommunications Facilities Program, NTIA/DOC, 14th Street and Constitution Avenue, NW., room H–4625, Washington, DC 20230.

(b) Application materials may be obtained from the address listed in paragraph (a).

(c) *Closing date.* The Administrator shall select and publish in the **Federal Register** a date by which applications for funding in a current fiscal year are to be filed.

(d) *New applications.* (1) All applications, whether mailed or hand delivered, must be received by the Agency at the address listed in the annual **Federal Register** announcement requesting applications at or before 5 p.m. on the closing date.

(2) A complete application must include an original and one copy of the Agency application form with the signature of an officer of the applicant who is legally authorized to sign for the applicant, and all the information required by the Agency application materials, which shall include:

(i) A brief narrative statement (of not more than four (4) pages) describing the proposed project with particular attention to satisfying the appropriate funding criteria as listed in §§ 2301.13 or 2301.14 of these Rules;

(ii) If the applicant has not received a PTFP grant within the previous ten (10) years, a copy of the applicant's articles of incorporation, bylaws, a list of the members of the board of directors, and other similar documentation specifying the nature and powers of the applicant, except that state or local government entities need only provide a reference to the statutory or other authority under which they operate;

(iii) If the applicant is a nonprofit foundation, corporation, institution or association which has not received a PTFP grant within the previous ten (10) years, a copy of a letter from the Internal Revenue Service granting the applicant tax exempt status under section 501(c)(3) of the Internal Revenue Code, or other legal documentation of nonprofit status.

(iv) If the applicant received a PTFP grant within the previous ten (10) years, then it must reference the number of the previous grant, provide a copy of the most recent Annual Report or Quarterly Performance Report submitted to the PTFP, and submit a copy of any changes in the applicant's articles of incorporation or bylaws which have taken effect since the last grant was awarded;

(v) If the applicant applied for a preliminary determination of eligibility and received a positive determination, it may submit a copy of the official notification from the PTFP in lieu of the eligibility requirements of this section;

(vi) Documentation that the applicant will have, when needed, the funds to construct any facilities for which the Agency has granted matching funds;

(vii) Documentation that the applicant will have the funds necessary to operate and maintain those facilities once constructed;

(viii) Documentation of the amount of Federal and non-Federal financial support received by the applicant organization during each of the preceding three fiscal years or for the length of time the organization has been in existence if less than three years;

(ix) Applications requesting transmission or interconnection equipment should include an opinion letter from the applicant's attorney stating that the applicant will have either fee simple title or a long-term (i.e., ten-year) lease, or an option to obtain same, to any real or personal property necessary for the installation of the equipment. Applications for studio or test equipment should include similar materials regarding main transmission sites to ensure that a grant recipient will be able to utilize PTFP-funded equipment to provide public telecommunications services throughout the Federal interest period. The applicant must have the right to occupy, construct, maintain, operate, inspect, and remove the project equipment without impediment, and nothing must prevent the Federal government from entering the property and reclaiming or securing PTFP-funded property. The Agency reserves the right to review an applicant's site rights documents if deemed necessary;

(x) An inventory of all equipment (if any) currently owned by the applicant that corresponds to the type of equipment requested in the current application or that would be closely associated with the proposed project. The inventory should include manufacturers' names, model numbers, production years, and the dates of acquisition;

(xi) Within the narrative or as an optional exhibit no longer than two pages, a five-year plan outlining the applicant's projected facilities requirements and the projected costs of such requirements;

(xii) If special consideration is requested under § 2301.3, information detailing the basis for the request on the exhibit form provided by the Agency;

(xiii) Copies of letters transmitting a copy of the application to each of the entities required under § 2301.7;

(xiv) Significant documentation supporting the applicant's request for equipment, including as necessary the proper FCC authorization(s) cited in §§ 2301.8 and 2301.9, and if applicable, documentation indicating high incidence of repair or periods of inoperability;

(xv) Evidence that the applicant has participated (or, in the case of a planning grant, will participate) in comprehensive planning for the proposed project, including community involvement, an evaluation of alternate technologies and coordination with state telecommunications agencies, if any;

(xvi) Assurance that during the period in which the applicant possesses or uses the Federally funded facilities (whether or not this period extends beyond the Federal interest period), the applicant will not use or allow the use of the Federally funded equipment for essentially sectarian purposes;

(xvii) A detailed explanation of any complaints of discrimination currently pending or decided against the applicant before any court or governmental agency;

(xviii) A copy of any Environmental Impact Statement or other environmental assessment document prepared in conjunction with the proposed project as may be required by any Federal, state, or local law or regulation;

(xix) Assurance of compliance with all applicable Federal laws, rules or regulations relating to the project, as described on the application form provided by the Agency;

(xx) Assurance of compliance with all provisions of the Drug-Free Workplace Requirements and the Certifications for Contracts, Grants, Loans and Cooperative Agreements found in the application form;

(xxi) Assurance that the applicant has taken into account all non-Federal sources of financial support for this project; that the non-Federal share stated by the Applicant as being available for this project is the maximum amount available from such sources; and that the applicant will initiate and complete the work within the applicable time frame after receipt of approval from the Agency; and,

(xxii) Assurance that the applicant will make the most economical and efficient use of the Federal funds.

(e) *Deferred applications.* (1) An applicant may reactivate an application deferred by the Agency during the prior year under § 2301.15 if the applicant has not substantially changed the stated purpose of the application.

(2) An applicant may reactivate a deferred application only during the two consecutive years following the application's initial acceptance for filing by the Agency.

(3) To reactivate a deferred application, the applicant must file the information described in paragraph (e)(4), of this section below, whether mailed or hand delivered, at or before 5 p.m. on the closing date.

(4) To file a complete reactivation request, the applicant must submit an original and one copy of the following:

(i) Part I of the approved Agency application form with the original signature of an officer of the applicant who is legally authorized to sign for the applicant, with a notation of the file number of the earlier application;

(ii) A brief narrative statement (not more than four (4) pages) describing the project proposed in the current application;

(iii) An update of the availability of operating funds and the necessary non-Federal share of the project;

(iv) An update of the financial information required by paragraph (d)(2)(viii) of this section;

(v) A revised listing of current eligible project costs, if necessary;

(vi) A revised inventory as described in paragraph (d)(2)(x) of this section. Applicants having previously submitted an inventory need submit only updated information;

(vii) A revised five-year plan as described in paragraph (d)(2)(xi) of this section outlining the applicant's projected facilities requirements and the projected costs of such requirements;

(viii) If special consideration is requested under § 2301.3, current information detailing the basis for the request on the exhibit form provided by the Agency;

(ix) Copies of letters transmitting a copy of the current application to each of the entities required under § 2301.7;

(x) An updated explanation of any complaints of discrimination currently pending or decided against the applicant before any court or governmental agency; and,

(xi) Assurance of compliance with all applicable Federal laws, rules or regulations relating to the project, as described on the application form provided by the Agency.

(f) Deferred applications that are resubmitted under paragraph (e) of this section and contain substantial changes will be considered as new applications and must comply with the requirements of § 2301.5(d). All deferred applications may be subject to a second determination of eligibility.

(g) *Applications resulting from catastrophic damage.* (1) An application may be filed with a request for a waiver of the closing date, as provided in § 2301.25, when an eligible broadcast applicant suffers catastrophic damage to the basic equipment essential to its continued operation as a result of a natural or manmade disaster and is in dire need of assistance in funding replacement of the damaged equipment.

(2) The request for a waiver must set forth the circumstances that prompt the request and be accompanied by appropriate supporting documentation.

(3) A waiver will not be granted if it is determined that the applicant has not carried proper insurance.

(4) Applications filed and accepted pursuant to this paragraph must contain all of the elements stipulated in paragraph (d) or (e), above, and will be subject to the same review and evaluation process followed for applications accepted for filing in the normal application cycle, although the Administrator may establish a special timetable for review and evaluation to permit an appropriately timely decision.

§ 2301.6 Additional information.

(a) The Agency may request from the applicant any additional information that the Agency deems necessary or pertinent. Applicants must provide to the Agency two copies of any additional information that the Agency requests within fifteen (15) days of the date of the Agency's letter.

(b) Applicants must immediately provide to the Agency two copies of information received after the closing date that materially affects the application, including:

(1) State Single Point of Contact and State Telecommunications Agency comments on applications;

(2) FCC file numbers and changes in the status of FCC applications necessary for the proposed project;

(3) Changes in the status of proposed local matching funds, including notification of the passage (including reduction or rejection) of a proposed state appropriation or receit (or denial) of a proposed substantial matching gift;

(4) Changes in the licensee, in the licensee's board structure, in the applicant's IRS section 501(c)(3) status, or in the applicant's Articles of Incorporation or Bylaws;

(5) Changes in the status of proposed production, participation or distribution agreements (if relevant to the proposed project);

(6) Changes in lease or site rights agreements; and

(7) Complete failure of major items of equipment for which replacement costs have been requested or changes in the status of the needs of the equipment requested.

(c) Applicants must place copies of any additional information submitted to the Agency in the copy of the application available for public inspection pursuant to § 2301.11.

(d) Potential grant recipients may be subject to the following Department Pre-Award Administrative Requirements and Policies:

(1) Name Check forms (Form CD–346) may be used to ascertain background information on key individuals associated with potential grantees. The Name Check requests information to determine if any key individuals in the organization have been convicted of, or are under indictment or have been charged with criminal offenses such as fraud, theft, perjury, or other matters pertinent to management honesty or financial integrity;

(2) Potential grantee organizations may also be subject to reviews of Dun and Bradstreet data or other similar credit checks.

§ 2301.7 Service of applications.

On or before the closing date all new or deferred applicants must serve a copy of the application on the following agencies:

(a) In the case of an application for a construction grant for which FCC authorization is necessary, the Secretary, Federal Communications Commission, 1919 M Street NW., Washington, DC 20554;

(b) The state or local agency(-ies), if any, having jurisdiction over the development of broadcast and/or nonbroadcast telecommunications in the state(s) and the community(-ies) to be served by the proposed project; and,

(c) The state office established to review applications under Executive Order 12372 as amended by Executive Order 12416, if the state has established such an office and wishes to review these applications.

§ 2301.8 Federal Communications Commission authorization.

(a) Each applicant whose project required FCC authorization must file an application for that authorization on or before the closing date. Recommended submission date for applications to the FCC is at least 60 days prior to the closing date. The applicant should clearly identify itself as a PTFP applicant.

(b) In the case of FCC authorizations where it is not possible or practical to submit the FCC license application with the PTFP application, such as C-band satellite uplinks, low power television stations and translators, remote pickups, studio-to-transmitter links, and Very Small Aperture Terminals, a copy of the FCC application as it will be submitted to the FCC, or the equivalent engineering data, must be included in the PTFP application.

(c) Any FCC authorization required for the project must be in the name of the applicant for the PTFP grant.

(d) If the project is to be associated with an existing station, FCC operating authority for that station must be current and valid.

(e) For any project requiring new authorization(s) from the FCC, the applicant must file a copy of each FCC application and any amendments with the Agency.

(f) If the applicant fails to file the required FCC application(s) by the closing date, or if the FCC returns, dismisses, or denies an application required for the project or any part thereof, or for the operation of the station with which the project is associated, the Agency may return the application.

(g) No grant will be awarded until confirmation has been received from the FCC that any necessary authorization will be issued.

§ 2301.9 Acceptance for filing.

After the closing date, the Agency will examine each application for timeliness, completeness, eligibility, and FCC authorization.

(a) The Agency will publish a notice in the **Federal Register** listing all applications accepted for filing. Acceptance of an application for filing does not preclude subsequent return or disapproval of the application, nor does it assure that the application will be funded. Publication merely operates to qualify the application to compete for funding with other applications accepted for filing.

(b) The notice of acceptance for filing will also include a request for comments on the applications from any interested party. The procedural requirements of § 2301.11 will be set forth in the notice.

(c) Substantially incomplete applications will be returned by the Agency.

(d) Any application, amendment to an application, or request to reactivate a deferred application that is filed after the closing date will be returned by the Agency.

(e) When the Agency finds that either the applicant or the project is ineligible under the Act and/or these Rules, it will return the application and inform the applicant of the denial of eligibility.

(f) If the Agency finds that a proposed project requires authorization from the FCC and that the applicant did not tender its application for such authorization, the Agency will return the application.

(g) With respect to requests to withdraw or to defer applications fro consideration:

(1) Applicants may request withdrawal of an application from consideration for funding. Withdrawn applications will be returned by the Agency.

(2) Applicants may not request that the Agency defer an application for subsequent consideration. A request for deferral of an application will be considered a request for withdrawal.

(h) Deferred applications that are submitted for reactivation for a third time will be returned by the Agency.

§ 2301.10 Appeals.

(a) Within 15 calendar days after the date on which the Agency sends a written notice to an applicant denying the eligibility of the applicant or the proposed project, or notifying an applicant that its application is substantially incomplete, the applicant may file a written notice of appeal with the Administrator at the address listed in § 2301.5(a). Applicants may not appeal the return of applications filed after the closing date.

(b) The notice of appeal must show that the denial of eligibility or determination of incompleteness is factually or legally incorrect. If the applicant relies on any written documents or other materials to dispute the Agency's action, the applicant should list and attach a copy of each item or indicate that the Agency has a copy of the item in its possession.

(c) Upon receipt of the notice of appeal, the Administrator will review the appeal in consultation with the Chief Counsel and the PTFP Director and will render a written decision within 30 calendar days.

(d) If the Administrator sustains the denial of eligibility or the determination of incompleteness, the Agency will return the application to the applicant.

(e) All decisions of the Administrator made under paragraph (c) of this section are final.

§ 2301.11 Public comments.

(a) The applicant shall make a copy of its application available at its offices for public inspection during normal business hours.

(b) Any interested party may file comments with the Agency supporting or opposing an application and setting forth the grounds for support or opposition. Such comments must contain a certification that a copy of the comments has been delivered to the applicant. Comments must be sent to the address listed in § 2301.5(a).

(c) The Agency will incorporate all comments from the public and any replies from the applicant in the applicant's official file.

§ 2301.12 Coordination with interested agencies and organizations.

In acting on applications and carrying out other responsibilities under the Act, the Agency shall consult with:

(a) The FCC, with respect to functions that are of interest to, or affect other functions of the FCC;

(b) The Corporation for Public Broadcasting, public broadcasting agencies, organizations, other agencies, and institutions administering programs which may be coordinated effectively with Federal assistance provided under the Act; and,

(c) The state office established to review applications under Executive Order 12372 as amended by Executive Order 12416, if the state has established such an office and wishes to review these applications.

§ 2301.13 Funding criteria for construction applications.

In determining whether to approve or defer a construction grant application, in whole or in part, and the amount of such grant, the Agency will evaluate all the information in the application file and consider the following factors, each of which has equal weight:

(a) The extent to which the project meets the program purposes set forth in § 2301.2 as well as the specific program priorities set forth in the appendix of these Rules;

(b) The adequacy and continuity of financial resources for long-term operational support;

(c) The extent to which non-Federal funds will be used to meet the total cost of the project;

(d) The extent to which the applicant has:

(1) Assessed specific educational, informational, and cultural needs of the community(-ies) to be served, and the extent to which the proposed service will not duplicate service already available.

(2) Evaluated alternative technologies and the bases upon which the technology was selected;

(3) Provided significant documentation of its equipment requirements, and the urgency of acquisition or replacement;

(4) Provided documentation of an increasing pattern or substantial non-Federal financial support;

(5) Provided other evidence of community support, such as letters from elected or appointed policy-making officials, and from agencies for which the applicant produces or will produce programs or other materials;

(e) The extent to which the evidence supplied in the application reasonably assures an increase in public telecommunications services and facilities available to, operated by, and owned or controlled by minorities and women;

(f) The extent to which various items of eligible apparatus proposed are necessary to, and capable of, achieving the objectives of the project and will permit the most efficient use of the grant funds;

(g) The extent to which the eligible equipment requested meets current broadcast industry performance standards;

(h) The extent to which the applicant will have available sufficient qualified staff to operate and maintain the facility and provide services of professional quality;

(i) The extent to which the applicant has planned and coordinated the proposed services with other telecommunications entities in the service area;

(j) The extent to which the project implements local, statewide or regional public telecommunications systems plans, if any; and

(k) The readiness of the FCC to grant any necessary authorization.

§ 2301.14 Funding criteria for planning applications.

In determining whether to approve or defer a planning grant application, in whole or in part, and the amount of such grant, the Agency will evaluate all the information in the application file and consider, in no order of priority, the following factors:

(a) The extent to which the applicant's interests and purposes are consistent with the purposes of the Act and the priorities of the Agency;

(b) The qualifications of the proposed project planner;

(c) The extent to which the project's proposed procedural design assures that the applicant would adequately:

(1) Obtain financial, human and support resources necessary to conduct the plan;

(2) Coordinate with other telecommunications entities at the local State, regional and national levels;

(3) Evaluate alternative technologies and existing services; and

(4) Receive participation by the public to be served (and by minorities and women in particular) in the project planning;

(d) Any pre-planning studies conducted by the applicant showing the technical feasibility of the proposed planning project (such as the availability of a frequency assignment, if necessary, for the project); and,

(e) The feasibility of the proposed procedure and timetable for achieving the expected results

§ 2301.15 Action on all applications.

(a) After consideration of an application which the Agency has accepted for filing, any comments filed by interested parties and replies thereto, and any other relevant information, the Agency will take one of the following actions:

(1) Select the application for funding, in whole or in part;

(2) Defer the application for subsequent consideration;

(3) Return the application as ineligible pursuant to § 2301.9 with a notice of the grounds and reason; or,

(4) Return applications which remain unfunded after consideration by the Agency for three years.

(b) Upon the approval or deferral, in whole or in part, of an application, the Agency will inform:

(1) The applicant;

(2) Each State educational television, radio, or telecommunications agency, if any, in any state any part of which lies within the service area of the applicant's facility;

(3) The FCC; and,

(4) The Corporation for Public Broadcasting and, as appropriate, other public telecommunications entities.

(c) If the Agency decides to fund an application, the award documents will include grant terms and conditions and whatever other provisions are required by Federal law or regulations, or which may be deemed necessary or desirable for the achievement of program purposes.

(d) An applicant or an objecting party may not appeal to the Administrator the Agency's determination to fund or not fund a particular application.

(e) Information about grant terms and conditions or other applicable laws and regulations is available from PTFP at the address listed in § 2301.5(a).

(f) Written and oral contacts between PTFP staff members and applicants and their representatives during the application review period are governed by the following:

(1) Members of the PTFP staff are not authorized to discuss the merits of an application when it is under review.

(2) Applicants are expected to notify PTFP of events that occur after the closing date and that materially affect the application, including those items requested in § 2301.6(b).

(3) Other permissible contacts include:

(i) Appeals of PTFP determinations of the eligibility of an application, pursuant to § 2301.10;

(ii) Responses to adverse comments filed by members of the public pursuant to § 2301.11; and

(iii) Discussion of matters relating to other PTFP awards an organization may have.

(4) Nothing in this section should be interpreted as preventing PTFP staff from requesting an applicant to submit information that may not have been included in the original submission.

Subpart C—Federal Financial Participation

§ 2301.16 Amount of the Federal grant.

(a) *Construction grants.* (1) A Federal grant for the construction of a public telecommunications facility shall be in an amount determined by the Agency and set forth in the award document. Such amount may not exceed seventy-five (75) percent of the amount determined by the Agency to be the reasonable and necessary cost of such project.

(2) No part of the grantee's matching share of the eligible project costs may be met with funds paid by the Federal government, except where the use of such funds to meet a Federal matching requirement is specifically and expressly authorized by the relevant Federal statute.

(3) After the closing date, the applicant may, at its own risk, obligate non-Federal matching funds for the acquisition of proposed equipment. No funds from the Federal share of the total project cost may be obligated until the award period start date. If an applicant or recipient obligates Federal Award funds before the start date, the Department may refuse to offer the award or, if the award has already been granted, terminate the grant.

(4) Funds supplied to an applicant by the Corporation for Public Broadcasting may not be used for the required non-Federal matching purposes, except upon a clear compelling showing of need.

(b) *Planning grants.* A Federal grant for the planning of a public telecommunications facility shall be in an amount determined by the Agency and set forth in the award document and the attachments thereto. The Agency may provide up to one hundred (100) percent of the funds necessary for the planning of a public telecommunications construction project.

(c) Project costs do not include the value of eligible apparatus owned or acquired by the applicant prior to the closing date. Accepting title to donated equipment prior to the closing date is considered ownership or acquisition of equipment.

(d) If the actual costs incurred in completing the planning or construction project are less than the estimated project total costs, which were the basis for the Agency's determination of the initial grant award, the Agency shall reduce the amount of the final grant award so that the final grant award bears the same ratio to the actual cost of the project as the initial grant award bore to the estimated total project costs. In no case will the final grant award exceed the initial grant award.

§ 2301.17 Items and costs ineligible for Federal funding.

The following items and costs are ineligible for funding under the Act:

(a) *Equipment and supplies.* Each year, the Agency will review its list of ineligible equipment and supplies. A copy of the currently applicable list of ineligible equipment will be provided with every application package for PTFP grants.

(b) *Other expenses ineligible for funding.* (1) Buildings and modifications to buildings to house eligible equipment and fences surrounding them are not themselves eligible for funding under this program, except that small equipment shelters that are part of satellite earth stations, translators, microwave interconnection facilities, and similar facilities are eligible for funding;

(2) Land and land improvements;

(3) Salaries of personnel employed by an operating public telecommunications entity and other operational costs, except

(i) for planning projects (see section 392(c) of the Act); or,

(ii) to the extent that an applicant can demonstrate exceptional need or that substantially greater efficiency would result from staff installation.

(4) Moving costs required by relocations;

(5) Such other expenses as the Agency may determine prior to the award of a grant.

§ 2301.18 Payment of the Federal grant.

(a) The Department will not make any payment under an award, unless and until the recipient complies with all relevant requirements imposed by this Part. Additionally:

(1) With regard to a public telecommunications entity requiring FCC authorization, the Department will not make any payment until it receives confirmation that the FCC has granted any necessary authorization;

(2) The Department will not make any payment under an award unless and until any special award conditions stated in the award documents are met; and

(3) An agreement to share ownership of the grant equipment (*e.g.*, a joint venture for a tower) must be approved by the Agency before any funds for the project will be released.

(b) After the conditions indicated in paragraph (a) of this section have been satisfied, the Department will make payments to the grantee in such installments consistent with the percentage of project completion. As a general matter, the Agency expects grantees to expend local matching funds at a rate at least equal to the ratio of the local match to the Federal grant as stipulated in the grant award.

(c) When an applicant completes a construction project, the Agency will assign a completion date that the Agency will use to calculate the termination date of the Federal interest period. The completion date will be the date on which the grantee certifies in writing that the project is complete and in accord with the terms and conditions of the grant, as required under § 2301.20. If the PTFP Director determines that the grantee improperly certified the project to be complete, the PTFP Director will amend the completion date accordingly.

Subpart D—Accountability for Federal Funds

§ 2301.19 Retention of records.

(a) Each recipient of assistance under this program shall keep intact and accessible the following records:

(1) A complete and itemized inventory of all public telecommunications facilities under the control of the grantee, whether or not financed, in whole or in part, with Federal funds;

(2) Complete and current financial records that fully disclose the total amount of the project; the amount of the grant; the disposition of the grant proceeds; and the amount, nature and source of non-Federal funds associated with the project; and,

(3) All records specified in Office of Management and Budget Circular A–110 (for educational institutions, hospitals and nonprofit organizations) and 15 CFR

part 24 (for State and Local Governments).

(b) The grantee shall mark project apparatus in a permanent manner in order to assure easy and accurate identification and reference to inventory records. The marking shall include the PTFP grant number and a unique inventory number assigned by the grantee.

§ 2301.20 Completion of Projects.

(a) Upon completion of a planning project, the grantee must promptly provide to the Administrator two copies of any report or study conducted in whole or in part with funds provided under this program by sending the copies to the Agency. This report shall meet the goals and objectives for which the grant is awarded and shall follow the written instructions and guidance provided by the Agency. The grant award goals and objectives are stated in the planning narrative as amended and are incorporated by reference into the award agreement. The Agency shall review this report for the extent to which those goals and objectives are addressed and met, for evidence that the work contracted for under the grant award was in fact performed, and that the written instructions and guidance provided by the Agency, if any, were followed. If this report fails to address or meet any grant award goals or objectives, or if there is no evidence that the work contracted for was in fact performed, or if this report clearly indicates that the written instructions and guidance provided by the Agency, if any, were disregarded, then the Agency may pursue remedial action. Remedial action includes, but is not limited to, demand for submission, in whole or in part, of an acceptable final report. An unacceptable final report may result in the establishment of an account receivable by the Department.

(b) Upon completion of a construction project, the grantee must:

(1) Certify that the grantee has acquired, installed and begun operating the project equipment in accordance with the project as approved by the Agency and has complied with all terms and conditions of the grant as specified in § 2301.5;

(2) Certify that the grantee has obtained any necessary FCC authorizations to operate the project apparatus following the acquisition and installation of the apparatus and document the same;

(3) Certify that the facilities have been acquired, that they are in operating order and that the grantee is using the facilities to provide public telecommunications services in accordance with the project as approved by the Agency and document same;

(4) Certify that the grantee has obtained adequate insurance to protect the Federal interest in the project in the event of loss through casualty and provide the Agency with a copy of its insurance policy;

(5) Certify, if not previously provided, that the grantee has acquired all necessary leases or other site rights required for the project;

(6) Certify, if appropriate, that the grantee has qualified for receipt of funds from the Corporation for Public Broadcasting;

(7) Provide a complete and accurate final inventory of equipment acquired under the project and a final accounting of all project expenditures, including non-equipment costs (*e.g.*, installation costs); and

(8) Execute and record a final priority lien reflecting the completed project and assuring the Federal government's reversionary interest in all equipment purchased under the grant project for the duration of the Federal interest period.

§ 2301.21 Annual status report for construction projects.

(a) Recipients of construction grants are require to submit an Annual Status Report for each grant project that is in the Federal interest period. The Reports are due no later than April 1 in each year of the period. In the Annual Status Report, the grant recipient must certify:

(1) That it remains an eligible entity as defined in the PTFP Rules and Regulations;

(2) That it continues to use the equipment purchased under the grant to provide public telecommunications services as approved by the Agency for the original purposes of the grant;

(3) That it continues to hold any FCC authorizations necessary to operate the project apparatus;

(4) That it continues to protect all equipment purchased under the grant with adequate insurance coverage;

(5) That it remains in compliance with all of the terms and conditions of the grant; and

(6) That no significant changes have occurred during the reporting period with respect to any of the terms and conditions of the grant.

(b) In addition, the grant recipient must:

(1) Provide information as to whether any discrimination complaints are pending against it and whether, during the reporting period, any adverse judgments have been rendered against it because of discriminatory practices—

(i) Pending complaints must be described and their status given; adverse judgments must be summarized and a description given of what action the recipient has taken or is taking to remedy the effects of the adjudged discrimination;

(ii) If the recipient is a non-profit institution, or a college or university, discrimination complaints and adverse judgments must be reported for the entire organization, not just for the broadcast station. If the recipient is a state or municipal agency, discrimination complaints and adverse judgments should be reported only for the agency that received the Federal grant money, not the entire state or municipal government;

(2) Certify, if it is an academic institution, that it does not discriminate in its admissions policies or in the opportunities it affords to persons to participate in the receiving or providing of services (*Nota Bene*: this certification applies to the entire academic institution, not just to the entity that was the subject of the grant);

(3) Submit a separate Annual Status Report with an original signature for each grant it has received that is still in the Federal interest period; and

(4) Take whatever steps may be necessary to ensure that the Federal government's reversionary interest continues to be protected for the 10-year period by recording, when and where required, a lien continuation statement and reporting that fact in the Annual Status Report.

Subpart E—Control and Use of Facilities

§ 2301.22 Conditions attached to the Federal grant.

When an applicant is awarded a Federal grant under the PTFP, the applicant (now the grantee) takes the grant subject to certain conditions concerning the uses of the Federal monies and the equipment obtained with those monies. The conditions are those listed at § 2301.15(c) plus the following specific conditions:

(a) In order to assure that the Federal investment in public telecommunications facilities funded under the Act will continue to be used to provide public telecommunications services to the public during the period of Federal interest, which shall be no less than ten (10) years from the date of completion of the project, all grantees shall:

(1) Execute and record a document establishing that the Federal government has a priority lien on any

facilities purchased with funds under the Act during the period of continuing Federal interest. The document shall be recorded where liens are normally recorded in the community where the facility is located and in the community where the grantee's headquarters are located;

(2) File a certified copy of the recorded lien with the Administrator ninety days after the grant award is received;

(3) Not dispose of or encumber its title or other interests in the equipment acquired under this grant and will, if applicable, file any continuation statements necessary to preserve the Federal Government's secured interest in the equipment acquired with Federal funds.

(b) During the construction of a project and the Federal interest period, the grantee must:

(1) Continue to be an eligible organization as described in § 2301.4, above;

(2) Obtain and continue to hold any necessary FCC authorization(s);

(3) Use the Federal funds for which the grant was made for the equipment and other expenditure items specified in the application for inclusion in the project, except that the grantee may substitute other items where necessary or desirable to carry out the purpose of the project as approved in advance by the agency in writing;

(4) Use the facilities and any monies generated through the use of the facilities primarily for the provision of public telecommunications services and ensure that the use of the facilities for other than public telecommunications purposes does not interfere with the provision of the public telecommunications services for which the grant was made;

(5) Not make its facilities available to any person for the broadcast or other transmission intended to be received directly by the public, of any advertisement, unless such broadcast or transmission is expressly and specifically permitted by law or authorized by the FCC;

(6) Hold appropriate title or lease satisfactory to protect the Federal interest to the site or sites on which apparatus proposed in the project will be operated, including the right to construct, maintain, operate, inspect and remove such apparatus, sufficient to assure continuity of operation of the facility;

(7) Maintain protection against common hazards through adequate insurance coverage or other equivalent undertakings, except that, to the extent the applicant follows a different policy of protection with respect to its other property, the applicant may extend such policy to apparatus acquired and installed under the project, if they receive express written approval for this different policy from the Director. The grantee will purchase flood insurance (in communities where such insurance is available) if the facilities will be constructed in any areas that has been identified by the Secretary of Health and Human Services as having special flood hazards;

(8) Submit, in triplicate, within 30 calendar days of the award date, to the Agency a construction schedule or a revised planning timetable that will include the information requested in the grant terms and conditions in the award package;

(9) Comply with 15 CFR part 24 and the provisions of the Office of Management and Budget Circular A–128 (for State and Local Governments and political subdivisions) and OMB Circulars A–110 and A–122 and 15 CFR part 29b (for institutions of higher education, hospitals and other nonprofit organizations) for the procurement of equipment and services funded in whole or in part with Federal monies;

(10) Remit interest earned on advances of Federal funds to the Agency in accordance with all relevant Federal laws and regulations;

(11) State when advertising for bids for the purchase of equipment that the Federal Government has an interest in facilities purchased with Federal funds under this program which begins with the purchase of the facilities and continues for ten (10) years after the completion of the project;

(12) Submit, during the construction of this project, both performance reports and the required financial reports, in triplicate, on a calendar year quarterly basis for the periods ending March 31, June 30, September 30, and December 31, or any portion thereof. Reports are due no later than 30 days following the end of each reporting period. The Quarterly Performance Reports should contain the following information:

(i) A comparison of actual accomplishments during the reporting period with the goals and dates established in the Construction or Planning Schedule for that reporting period;

(ii) Description of any problems that have arisen or reasons why established goals have not been met;

(iii) Actions taken to remedy any failures to meet goals; and

(iv) Construction projects must also include a list of equipment purchased during the reporting period compared with the equipment authorized. This information must include manufacturer, make and model number, brief description and number of the items purchased, cost;

(13) Promptly complete the project and place the public telecommunications facility into operation;

(14) Permit inspections during normal working hours by the Agency and the Comptroller General of the United States or their duly authorized representatives, of the public telecommunications facilities acquired with Federal financial assistance or of any books, documents, papers, and records relating to those facilities;

(15) Comply with Federal statutes relating to nondiscrimination. These include but are not limited to: (i) Title VI of the Civil Rights Act of 1964 (Pub. L. 88–352), which prohibits discrimination on the basis of race, color or national origin; (ii) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681–1683, and 1685–1686), which prohibits discrimination on the basis of sex; (iii) section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794, which prohibits discrimination on the basis of handicaps; (iv) the Age Discrimination Act of 1975, as amended (42 U.S.C. 6101–6107), which prohibits discrimination on the basis of age; (v) the Drug Abuse Office and Treatment Act of 1972 (Pub. L. 92–255), as amended, relating to nondiscrimination on the basis of drug abuse; (vi) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (Pub. L. 91–616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (vii) section 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd–3 and 290 ee–3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (viii) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (ix) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (x) the requirements of any other nondiscrimination statute(s) which may apply to the application.

(16) Obtain the Agency's prior approval for substantial changes in the approved grant project, including but not limited to the following:

(i) Costs (including planning costs),

(ii) Essential specifications of the equipment,

(iii) The engineering configuration of the project,

(iv) Extensions of the approved grant award period, and

(v) Transfers of a grant award to a successor in interest, pursuant to § 2301.23(c)(1).

(17) Comply with all applicable Federal laws, rules or regulations relating to the project.

(c) The Agency will allow the acquisition of facilities by lease; however, several provisions must be followed:

(1) The lease must be for a term of years not greater than the remaining useful life of the facilities nor less than ten (10) years following completion of the project (including renewal options);

(2) The cost of the lease must not be more than the total of the non-Federal share of the matching funds;

(3) The actual amount of the lease must not be more than the outright purchase price would be; and

(4) The lease agreement must state that in the event of anticipated or actual termination of the lease, the Federal Government through the Agency has the right to transfer and assign the leasehold to a new grantee for the duration of the lease contract.

(d) During the period in which the grantee possesses or uses the Federally funded facilities (whether or not this period extends beyond the Federal interest period), the grantee may not use or allow the use of the Federally funded equipment for purposes the essential thrust of which are sectarian.

§ 2301.23 Grant suspensions, terminations, and transfers.

(a) *Suspension or termination for cause.* If a grantee fails to meet any conditions attached to the grant, as specified in sections 2301.15(c) and 2301.22 of this part, the Agency reserves the right to recommend any appropriate action including, but not limited to:

(1) Suspending a particular grant in whole or in part and withholding further payments under that grant, pending corrective action by the grantee;

(2) Prohibiting a grantee from incurring additional obligations of funds, pending corrective action by the grantee;

(3) Where the grantee cannot (or will not) comply with the condition (or conditions) attached to a particular grant, terminating the grant and requiring the grantee to repay the Federal Government an amount bearing the same ratio to the fair market value of the facilities at the time of termination as the Federal grant bore to the project;

(4) Where the condition (or conditions) is also attached to other grants that the grantee has received from the Agency, suspending payments under all these other grants;

(5) Where the condition (or conditions) is also attached to other grants that the grantee has received from the Agency, terminating all these other grants and requiring the grantee to repay the Federal Government an amount bearing the same ratio to the fair market value of the facilities at the time of termination as the Federal grants bore to the projects for which they were granted.

(b) *Termination for convenience.* When the Agency and the grantee agree that the continuation of the project would not produce beneficial results commensurate with the expenditure of further Federal funds, the parties may terminate the grant, in whole or in part, with all the conditions and on an effective date that the parties have mutually agreed in writing.

(c) *Transfers.* If necessary to further the purpose of the Act, the Agency may approve transfers as follows:

(1) *Transfer of grant.* The Agency may transfer a grant to a successor in interest or subsidiary corporation of a grantee in cases where a similar operational entity remains in control of the grant and the original objectives of the grant remain in effect.

(2) *Transfer of equipment.* Where the grant equipment is no longer needed for the original purposes of the project, the Agency may transfer the equipment to the Federal government or an eligible third party, in accordance with Office of Management and Budget guidelines.

(3) *Transfer of Federal interest to different equipment.* The Agency may transfer the Federal interest in PTFP-funded equipment to other eligible equipment presently owned or to be purchased by the grantee with non-Federal monies.

(i) Equipment previously funded by PTFP that is within the Federal interest period, may not be used in a transfer request as the designated equipment to which the Federal interest is to be transferred.

(ii) The same item can be used only once to substitute for the Federal interest; however, it may be used to cover grants if the request for each is submitted at the same time.

(iii) A lien on equipment transferred to the Federal interest must be recorded in accordance with § 2301.22 of the PTFP Rules. A copy of the lien document must be filed with the PTFP within 60 days of the date of approval of the transfer of Federal interest.

(iv) If the Federal interest is to be transferred to other equipment presently owned or to be purchased by a grantee, the Federal interest in the new equipment must be at least equal to the Federal interest in the original equipment.

(d) *Termination by buy-out.* A grantee may terminate the PTFP grant by buying out the Federal interest with non-Federal monies. Buy-outs may be requested at any time.

§ 2301.24 Equipment.

All equipment, which a grantee acquires under this program, shall be of professional broadcast quality. An applicant proposing to utilize nonbroadcast technology shall propose and purchase equipment that is compatible with broadcast equipment wherever the two types of apparatus interface.

Subpart F—Waivers

§ 2301.25 Waivers.

For good cause shown, the Administrator may waive the regulations adopted pursuant to section 392(e) of the Act.

Appendix to Part 2301—Special Applications and Priorities

Special Applications

NTIA possesses the discretionary authority to recommend awarding grants to eligible broadcast and nonbroadcast applicants whose proposals are so unique or innovative that they do not clearly fall within the priorities listed below. Innovative projects submitted under this category must address demonstrated and substantial community needs (*e.g.*, service to identifiable ethnic or linguistic minority audiences, service to the blind or deaf, electronic text, and nonbroadcast projects offering educational or instructional services).

Priorities

Priority 1—Provision of Public Telecommunications Facilities for First Radio and Television Signals to a Geographic Area. Within this category, NTIA establishes three subcategories:

A. *Projects that include local origination capacity.* This subcategory includes the planning or construction of new facilities that can provide a full range of radio and/or television programs including material that is locally produced. Eligible projects include new radio or television broadcast stations, new cable systems, or first public telecommunications service to existing cable systems, provided that such projects include local origination capacity.

B. *Projects that do not include local origination capacity.* This subcategory includes projects such as increases in tower height and/or power of existing stations and construction of translators, cable networks and repeater transmitters that will result in providing public telecommunications services to previously unserved areas.

C. *Projects that provide first nationally distributed programming.* This subcategory includes projects that provide satellite

downlink facilities to noncommercial radio stations that would bring nationally distributed public radio programming to a geographic area for the first time.

Priority 1 and its subcategories only apply to grant applicants proposing to plan or construct new facilities to bring public telecommunications services to geographic areas that are presently unserved, *i.e.*, areas that do not receive any public telecommunications services whatsoever. (It should be noted that television and radio are considered separately for the purposes of determining coverage.)

An applicant proposing to plan or construct a facility to serve a geographical area that is presently unserved, should indicate the number of persons who would receive a first public telecommunications signal as a result of the proposed project.

Priority 2—Replacement of Basic Equipment of Existing Essential Broadcast Stations. Projects eligible for consideration under this category include the urgent replacement of obsolete or worn out equipment in existing broadcast stations that provide either the only public telecommunications signal or the only locally originated public telecommunications signal to a geographical area.

In order to show that the urgent replacement of equipment is necessary, applicants must provide documentation indicating excessive downtime, or a high incidence of repair (*i.e.*, copies of repair records, or letters documenting non-availability of parts.) Additionally, applicants must show that the station is the only public telecommunications station providing a signal to a geographical area or the only station with local origination capacity in a geographical area.

The distinction between Priority 2 and Priority 4 is that Priority 2 is for the urgent replacement of basic equipment for essential stations. Where an applicant seeks to "improve" basic equipment in its station (*i.e.*, where the equipment is not "worn out"), or where the applicant is not an essential station, NTIA would consider the applicant's project under Priority 4.

Priority 3—Establishment of a First Local Origination Capacity in a Geographical Area. Projects in this category include the planning or construction of facilities to bring the first local origination capacity to an area already receiving public telecommunications services from distant sources through translators, repeaters or cable systems.

Applicants seeking funds to bring the first local origination capacity to an area already receiving some public telecommunications services may do so, either by establishing a new (and additional) public telecommunications facility, or by adding local origination capacity to an existing facility. A source of a public telecommunications signal is distant when the geographical area to which the source is brought is beyond the grade B contour of the origination facility.

Priority 4—Replacement and Improvement of Basic Equipment for Existing Broadcast Stations. Projects eligible for consideration under this category include the replacement of obsolete or worn-out equipment and the upgrading of existing origination or delivery capacity to current industry performance standards (e.g., improvements to signal quality, and significant improvements in equipment flexibility or reliability). As under Priority 2, applicants seeking to replace or improve basic equipment under Priority 4 should show that the replacement of the equipment is necessary by including in their applications data indicating excessive downtime, or a high incidence of repair (such as documented in repair records). Within this category, NTIA establishes two subcategories:

4A. This subcategory includes the replacement and improvement of basic equipment at existing public broadcasting stations that do not provide either the only public telecommunications signal or the only locally originated public telecommunications signal to a geographical area and therefore cannot qualify for Priority 2 consideration.

Under Priority 4A, NTIA will consider applications to replace urgently needed equipment from public broadcasting stations that do not meet the Priority 2 criteria. NTIA will also consider applications that improve as well as replace urgently needed equipment at public radio and television stations that do not qualify for Priority 2 consideration but that produce, on a continuing basis, significant amounts of programming distributed nationally to public radio or television stations.

This subcategory will also enable the acquisition of satellite downlinks for public radio stations in areas already served by one or more full-service public radio stations. The applicant must demonstrate that it will broadcast a program schedule unique to its service area, not one merely duplicative of what is already available, and certify that it will continue to provide such a schedule for a minimum of five (5) years after completion of the project.

The final projects included in this subcategory would enable the acquisition of the necessary items of equipment to bring the inventory of an already-operating station to the basic level of equipment requirements established by PTFP. This is intended to assist stations that went on the air within the prior five (5) years with a complement of equipment well short of what the Agency considers as the basic complement.

4B. This subcategory includes the improvement and non-urgent replacement of equipment at any public broadcasting station. Also included would be the activation of a broadcast station in an area already served by one or more stations with local origination capability when the applicant does not qualify for Special Consideration for minority/women participation.

Priority 5—Augmentation of Existing Broadcast Stations. Projects in this category would equip an existing station beyond a basic capacity to broadcast programming from distant sources and to originate local programming.

A. *Projects to equip auxiliary studios at remote locations, or to provide mobile origination facilities.* An applicant must demonstrate that significant expansion in public participation in programming will result. This subcategory includes mobile units, neighborhood production studios or facilities in other locations within a station's service area that would make participation in local programming accessible to additional segments of the population.

B. *Projects to augment production capacity beyond basic level in order to provide programming or related materials for other than local distribution.* This subcategory would provide equipment for the production of programming for regional or national use. Need beyond existing capacity must be justified.

[FR Doc. 91-18850 Filed 8-8-91; 8:45 am]
BILLING CODE 3510-60-M

federal register

Friday
August 9, 1991

Part VI

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Part 19

Uniform Rules of Practice and Procedure; Final Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 19

[Docket No. 91-9]

Uniform Rules of Practice and Procedure

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: Section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") reguires that the Office of the Comptroller of the Currency ("OCC"), Board of Governors of the Federal Reserve System ("Board of Governors"), Federal Deposit Insurance Corporation ("FDIC"), Office of Thrift Supervision ("OTS"), and National Credit Union Administration ("NCUA") (collectively, the "Agencies") develop a set of uniform rules and procedures for administrative hearings ("Uniform Rules"). Section 916 further reguires that the Agencies promulgate provisions for summary judgment rulings where there are no disputes as to the material facts of a case.

In compliance with the mandate of section 916, this final rule makes uniform those rules concerning formal enforcement actions common to at least four of the listed Agencies. In addition to these Uniform Rules, the OCC and each of the other Agencies is adopting complementary "Local Rules" to supplement the Uniform Rules in order to address some or all of the following: Formal enforcement actions not within the scope of the Uniform Rules, informal actions which are not subject to the Administrative Procedure Act ("APA"), and procedures to supplement or facilitate the processing of administrative enforcement actions within the OCC and the other Agencies. This final rule is intended to standardize procedures for formal administrative actions and to facilitate administrative practice before the Agencies.

EFFECTIVE DATE: August 9, 1991.

FOR FURTHER INFORMATION CONTACT: Barrett Aldemeyer, Senior Attorney, Legislative and Regulatory Analysis Division (202/874-5090), or Daniel Stipano, Assistant Director, Enforcement and Compliance Division (202/874-4800).

SUPPLEMENTARY INFORMATION:

A. Background

Section 916 of FIRREA, Public Law No. 101-73, 103 Stat. 183 (1989), requires that the OCC, Board of Governors, FDIC, OTS, and NCUA develop a set of uniform rules and procedures for administrative hearings. By including this provision in FIRREA, Congress intended that the listed Agencies, by promulgating uniform procedures, would improve and expedite their administrative proceedings. The statutory provision is a reflection of "recent recommendations of the Administrative Conference of the United States and the House Government Operations Committee." H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1, at 396. The Administrative Conference of the United States found in its December 30, 1987 recommendation that

"(g)iven the similar statutory bases for these enforcement actions, the five agencies jointly should be able to develop substantially similar rules of procedure and practice for formal enforcement proceedings."

1 CFR 305.87-12.

To comply with the requirements of section 916, the OCC and the other financial institutions regulatory Agencies issued for comment a Joint Notice of Proposed Rulemaking on June 17, 1991 (56 FR 27790). The joint proposed rule contained one set of Uniform Rules applicable to all the Agencies and separate Local Rules applicable to each agency.

The OCC has received comments on the joint proposed rule and is now issuing a final rule. This final rule is intended to standardize procedures for formal administrative actions common to at least four of the five Agencies and to facilitate administrative practice before the Agencies.

Subpart A of the OCC's final rule in 12 CFR part 19, the "Uniform Rules," sets forth the uniform rules of practice and procedure for those formal enforcement actions which are required by statute to be determined on the record after an opportunity for an agency hearing and which are common to at least four of the Agencies. The Uniform Rules in subpart A of this final rule generally replace the procedures governing formal adjudications in 12 CFR part 19, subparts A through J, which were adopted on April 6, 1990 (55 FR 13014). Each agency is adopting substantially similar Uniform Rules.

The OCC's Local Rules in subparts B through L of this final rule address the following topics: Certain formal enforcement actions not addressed in the Uniform Rules, informal actions which are not subject to the APA, and procedures to supplement or facilitate the processing of administrative enforcement actions within the OCC. The Local Rules replace the procedures in subparts K through O of part 19 concerning certain formal and informal adjudications, practice before the OCC, and formal investigations. The revised text of subparts C, D, E, J, and K corresponds to the text of subparts K, M, L, N, and O, respectively. In the event of inconsistency with the provisions of subpart A, the Local Rules govern. The Local Rules also provide additional rules applicable to formal adjudications, discovery depositions, and other document filings with the OCC.

B. Subpart-by-Subpart Summary and Discussion of Uniform and Local Rules

Subpart A—Uniform Rules of Practice and Procedure

This subpart sets forth rules of practice and procedure governing formal administrative actions, including rules on commencing enforcement proceedings, filing and service of papers, motions, discovery, prehearing conferences, public hearings, hearing subpoenas, conflict of interest, ex parte communications, rules of evidence, and post-hearing procedures.

Subpart B—Filings With the Comptroller

This is a new subpart which incorporates the procedures found in § 19.11. All materials to be filed with or referred to the Comptroller or the administrative law judge under part 19 are to be filed with the Hearing Clerk. This does not include requests for document discovery or responses to such requests because these documents are not required to be filed with the administrative law judge or the Comptroller.

Subpart C—Removals, Suspensions, and Prohibitions When a Crime Is Charged or a Conviction Is Obtained

This subpart applies to informal hearings afforded an institution-affiliated party who has been suspended or removed from office or prohibited from further participation in bank affairs by the Comptroller. The text of this subpart corresponds to the text of former subpart K, which is incorporated into this subpart with minor changes.

Subpart D—Exemption Hearings Under Section 12(h) of the Securities Exchange Act of 1934

This subpart applies to informal hearings that may be held by the Comptroller, pursuant to the authority of the Securities Exchange Act of 1934 ("Exchange Act"), to grant certain exemptions from the securities laws. The text of this subpart corresponds to the text of former subpart M, which has

been incorporated into this subpart with minor changes.

Subpart E—Disciplinary Proceedings Involving the Federal Securities Laws

This subpart governs formal adjudications pursuant to the authority of the Exchange Act to take disciplinary actions against banks acting as a municipal securities dealer, a government securities broker or dealer, or a transfer agent, or persons associated with, or seeking to become associated with the above entities.

The text of this subpart corresponds to the text of the former subpart L, which has been incorporated into this subpart with minor changes. The proceedings shall be instituted on a public basis. Pursuant to § 19.33 of subpart A, a request for a private hearing may be filed within 20 days of service of the notice of charges. Except as provided in this subpart, the Uniform Rules in subpart A apply to these proceedings.

Subpart F—Civil Money Penalty Authority Under the Securities Laws

This subpart governs formal adjudications pursuant to the authority of section 21B of the Exchange Act (15 U.S.C. 78u–2), as added by section 202 of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Pub. L. 101–429). These provisions provide for the issuance of civil money penalties against banks acting as a municipal securities dealer, a government securities broker or dealer, or a transfer agent, or persons associated with, or seeking to become associated with the above entities.

The provisions of subpart A apply to these proceedings. The proceedings shall be instituted on a public basis. Pursuant to § 19.33 of subpart A, a request for a private hearing may be filed within 20 days of service of the notice of assessment.

Subpart G—Cease-and-desist Authority Under the Securities Laws

This subpart governs informal adjudications pursuant to the authority of section 21C of the Exchange Act (15 U.S.C. 78u–3), as added by section 203 of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Pub. L. 101–429). These provisions provide for the institution of cease-and-desist proceedings against a bank for violation of certain provisions of the Exchange Act.

These proceedings are not "required by statute to be determined on the record after opportunity for an agency hearing," and thus are not "formal" adjudications subject to the APA. See 5 U.S.C. 554(a). The OCC has determined, however, that these proceedings should be conducted in a manner comparable to a formal adjudication to afford affected parties with the procedural protection of the APA.

This subpart provides, therefore, that the provisions for formal adjudications in subpart A are applicable to these proceedings. The proceedings shall be instituted on a public basis. Pursuant to § 19.33 of subpart A, any request for a private hearing must be filed within 20 days of service of the notice of charges.

Subpart H—Change in Bank Control

This subpart governs formal adjudications under section 7(j) of the Federal Deposit Insurance Act ("FDIA") (12 U.S.C. 1817(j)) concerning the review of a determination by the Comptroller disapproving an application to acquire control of a national bank.

Upon issuance of the OCC's written disapproval of a change-in-control application, the applicant may file a written request for a hearing within ten days after service of the notice of disapproval. To preserve the applicant's right to a hearing, an answer must also be filed within 20 days of the date of the notice, specifically denying those portions of the notice which are disputed. If the applicant fails to file a timely answer, Enforcement Counsel may file a motion for a default judgment. Absent a finding of good cause for failure to file a timely answer, the administrative law judge shall issue a recommended decision containing the findings and relief sought in the notice.

As provided in § 19.18(a)(2) of subpart A, change-in-control proceedings commence with the issuance of an order by the Comptroller. This hearing order will set forth the OCC's jurisdictional authority over the proceeding and will address the applicant's request for hearing. Except as provided in this subpart, the Uniform Rules in subpart A apply to these proceedings.

Subpart I—Discovery Depositions and Subpoenas

This subpart provides that a party may take the deposition of an expert or of another person, including another party, who has direct knowledge of matters that are non-privileged, relevant, and material to the proceeding and where there is a need for the deposition. While permitting the depositions of experts and persons having direct knowledge of the matters at issue in a proceeding, this provision is not intended to allow unlimited deposition discovery or the taking of senior OCC officials' depositions, unless those individuals have direct knowledge about the facts of the case. Rather, it is intended to permit limited deposition discovery of experts and persons having direct knowledge of the facts who may be called on to testify at the administrative hearing.

This subpart also provides that at the request of a party, the administrative law judge shall issue a subpoena requiring the attendance of a witness at a deposition. The party requesting the subpoena is responsible for serving it on the person named therein, or on that person's counsel. The person named in the subpoena may file a motion to quash or modify the subpoena within the time for compliance set forth in the subpoena, but in no case later than ten days after the date of service.

Subpart J—Formal Investigations

This subpart and the conflict of interest provision of the Uniform Rules (§ 19.8 of subpart A) apply to formal investigations initiated by order of the Comptroller or the Comptroller's delegate, pursuant to the authority of the banking laws and the Exchange Act. The text of this subpart corresponds to the text of former subpart N, which has been incorporated into this subpart with minor modifications to reference the Uniform Rules.

Subpart K—Parties and Representational Practice Before the OCC: Standards of Conduct

This subpart sets forth rules relating to parties and representational practice before the OCC, including the imposition of disciplinary sanctions against individuals who appear before the OCC in a representational capacity in an adjudicatory proceeding under this part or in other matters relating to a client's rights, privileges, or liabilities. The text of this subpart corresponds to the text of former subpart O, which has been incorporated into this subpart with minor modifications to reference the Uniform Rules and to clarify the scope of the proceedings.

Subpart L—Equal Access to Justice Act

This subpart directs the reader to 31 CFR part 6 which contains the regulations governing Equal Access to Justice claims with respect to OCC formal adjudicatory proceedings.

C. Comments

In response to the June 17, 1991, joint notice of proposed rulemaking, the OCC and the other Agencies received three comment letters. The five Agencies have jointly reviewed the portions of the comments concerning the Uniform Rules. The specific questions and

objections pertaining to the Uniform Rules are discussed below.

(1) One commenter stated that, in light of the decision of the United States Court of Appeals for the Fifth Circuit in *Amberg* v. *FDIC*, July 2, 1991, the provisions in § 19.19 requiring an administrative law judge to grant a default order against a respondent who has not filed a timely answer are not consistent with the holding in *Amberg*. The commenter suggested that changes be made to the section to allow a late filing if good cause is shown and recommended that "good cause" be defined consistent with the definition appearing in the Federal Rules of Civil Procedure.

The Uniform Rules allow an administrative law judge to extend time limits for good cause (§ 19.13) and require that defaults be entered only upon a motion for default filed by Enforcement Counsel (§ 19.19), thereby permitting respondents an opportunity to oppose such a motion. Thus, the rules address the concerns raised by the commenter. However, to alleviate confusion, the Agencies have changed the wording of the final default rule to make this process more explicit.

(2) A commenter suggested that uniform rules should also be drafted for formal investigations, Equal Access to Justice Act implementation, sanctions, and a number of other procedures.

The lack of uniformity in these areas is based on the scope of section 916 of FIRREA. As noted above, the purpose for the enactment of section 916 was the improvement and expedition of formal enforcement proceedings subject to the APA. *Cf.* 1 CFR 305.87–12; H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 442 (1989). Accordingly, the inclusion of non-APA proceedings would exceed the statutory mandate of section 916 and would present practical implementation problems as well. For example, the Uniform Rules do not contain provisions for formal investigations. This is because investigatory proceedings are not formal adjudicatory proceedings subject to the APA. In addition, the statutory authority for formal investigations arises in several statutes, and the Agencies have differing policies concerning the frequency, length, and procedures for formal investigations. This diversity in statutory authority is reflected in the independent and separate procedures of each agency. Therefore, the Agencies have not changed these provisions.

(3) The same commenter suggested that the Agencies consider adopting rules concerning the publication of enforcement orders and actions to promote uniformity.

Congress recently addressed this concern when it amended 12 U.S.C. 1818(u) in Title XXV of the Crime Control Act of 1990, Public Law No. 101–647, 104 Stat. 4789. The Agencies are required by statute to publish all final orders and other documents subject to enforcement action. Each of the Agencies has procedures implementing this statutory directive and most, if not all, enforcement decisions may be found by consulting the Public Reading Rooms or libraries of each agency. In addition, each of the Agencies frequently issues press releases concerning recent cases and decisions. Therefore, no change in the Uniform Rules is warranted.

(4) An issue was raised by two of the commenters concerning the different positions taken by the Agencies on discovery depositions. The commenters stated that use of discovery depositions would encourage settlements and would result in the increased use of summary judgment by establishing the absence of disputes as to material facts.

The scope of discovery which would be permitted in the Uniform Rules was considered at length. The Agencies determined that broad document discovery would be permitted generally; however, they recognized that there is no constitutional right to prehearing discovery, including deposition discovery, in Federal administrative proceedings. See *Sims* v. *National Transportation Safety Board*, 662 F.2d 668, 671 (10th Cir. 1981); *P.S.C. Resources, Inc.* v. *N.L.R.B.*, 576 F.2d 380, 386 (1st Cir. 1978); *Silverman* v. *Commodity Futures Trading Comm.*, 549 F.2d 28, 33 (7th Cir. 1977). Further, the APA contains no provisions for prehearing discovery, and the discovery provisions of the Federal Rules of Civil Procedure are inapplicable to administrative proceedings. *Frillette* v. *Kimberlin*, 508 F.2d 205 (3rd Cir. 1974), *cert. denied* 421 U.S. 980 (1975). Rather, each agency determines the extent of discovery to which a party in an administrative hearing is entitled. *McClelland* v. *Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979).

The Agencies attempted to strike a balance between the due process interests of respondents in obtaining pretrial disclosure, including discovery depositions, and the Agencies' need for swift adjudication while preserving limited resources. This process included taking into account the various interests and concerns of both the industry and public constituencies which each agency serves, as well as each agency's own institutional interests and concerns. The contrasting interests and concerns are reflected in the types, complexity, and quantity of enforcement actions brought by each agency; the methods of litigation and opportunity for settlement in such actions; the structure and available resources of each regulator; and the supervisory procedures developed internally by each agency. This process resulted in divergent provisions on the use of discovery depositions.

Thus, the experiences of the OCC, the Board of Governors, and the OTS resulted in a finding that discovery depositions served a useful purpose by promoting fact finding and encouraging settlements. Because of the increasing complexity of enforcement actions, where typically multiple counts, multiple parties, and several types of enforcement actions are combined into one, it was found that discovery depositions could be useful in aiding both respondents and the regulator in resolving cases expeditiously. Discovery depositions for the OCC, the Board of Governors, and the OTS, however, are limited to witnesses that have factual, direct, and personal knowledge of the matters at issue and expert witnesses. The FDIC and the NCUA determined that the interests of respondents in further pretrial disclosure in their respective proceedings were mitigated by the availability of extensive document discovery that complements the document-intensive nature of their proceedings.

(5) A commenter suggested that the definition of "decisional employee" in § 19.3(e) be expanded to preclude from service in a decisional capacity any employee of the Agencies who had served within the previous 12 months on the enforcement staff of any of the Agencies. The commenter suggested that this expansion would protect against bias and conflicting interest.

The Agencies did not adopt this suggestion. The APA forbids an employee from acting in a decisional capacity in a specific case where the employee has acted in an investigative or prosecutorial function in that same case or in a factually related case. 5 U.S.C. 554(d). Accordingly, Congress has already drawn the line defining conflicts of interest in this context. The Agencies determined that following the APA formulation was the preferred course of action.

(6) A commenter recommended that § 19.18(b) be modified to require that an agency set forth in a notice not only those facts showing that an agency is entitled to relief of some kind but also those facts required for the particular relief requested.

The Agencies believe that § 19.18(b) meets the standards for notice pleading

set forth in Rule 8 of the Federal Rules of Civil Procedure. The Agencies have determined that this is sufficient pleading for administrative proceedings. See *First National Monetary Corporation* v. *Weinberger*, 819 F.2d 1334, 1339 (6th Cir. 1987); *Boise Cascade Corporation* v. *Federal Trade Commission*, 498 F.Supp. 772, 780 (D.Del. 1980). Therefore, no change in the Uniform Rules is warranted.

(7) A commenter suggested that the Uniform Rules regarding severance of proceedings are unduly stringent in light of the severity of sanctions at stake. The commenter stated that any inconsistency or conflict in the position of respondents should warrant severance without the necessity of weighing any countervailing interests. The commenter further stated that concerns regarding administrative economy are not entitled to weight in light of the small number of cases that have been adjudicated by the Agencies in the past.

The Agencies noted that a similar weighing test for severance is applied by Federal courts in criminal cases, see *e.g.*, *Roach* v. *National Transportation Safety Board*, 804 F.2d 1147, 1151 (10th Cir. 1986), *cert. denied*, 496 U.S. 1006 (1988), demonstrating that the weighing test appropriately may be applied in cases involving substantial sanctions and penalties. In addition, the general interest in economy and efficiency in resolving an administrative adjudication exists independent of the total volume of adjudications at any particular time. Therefore, the Agencies did not change this provision.

(8) Section 19.24(c) provides that privileged documents are not discoverable. A commenter questioned the right of Enforcement Counsel to assert the deliberative process privilege pursuant to § 19.24(c) on grounds that, in some instances, it is subject to abuse by Enforcement Counsel seeking to prevent disclosure of relevant and probative material. The commenter suggested instead that all material for which the deliberative process privilege is claimed should be produced pursuant to a protective order barring public disclosure, and that § 19.24 should provide for *in camera* inspection of disputed privileged material by the administrative law judge.

The Agencies believe that Enforcement Counsel should retain the right to assert the deliberative process privilege at the outset. Ample means to challenge an improper assertion of privilege already are available to respondents without modifying § 19.24. Section 19.25(e) provides that all documents withheld from production on grounds of privilege must be reasonably identified and must be accompanied by a statement of the basis for the assertion of privilege. In the event that a respondent believes that grounds exist to challenge Enforcement Counsel's assertion of the deliberative process privilege, respondent would be able to utilize the identifying information and statement to challenge the assertion of the privilege before the administrative law judge. Confronted with such a challenge, an administrative law judge would need no further specific authority by rule to inquire of Enforcement Counsel as to the basis of the assertion of the privilege, to conduct an inspection of the assertedly privileged material *in camera*, and then to rule whether the privilege can be maintained. For these reasons, no change has been made in this provision.

(9) A commenter suggested that the determination to seal a document pursuant to § 19.33(b) should be subject to review by an administrative law judge under an abuse of discretion standard. It was also proposed that a respondent should be able to request that certain information such as confidential personal information be filed under seal.

The Uniform Rules accommodate this last concern by permitting a respondent to file a motion to seal a document containing confidential personal information. However, the statutory language of 12 U.S.C. 1818(u)(6) and 1786(s)(6) vests the Agencies with exclusive authority to seal all or part of a document if disclosure would be contrary to the public interest. Thus, the Agencies disagree with the commenter that this determination should be subject to review by an administrative law judge.

(10) A commenter suggested deleting § 19.36(c)(2), which provides that any document prepared by a Federal financial institutions regulatory agency or by a state regulatory agency is admissible with or without a sponsoring witness. The commenter stated that the provision violates normal evidentiary standards and raises due process concerns.

The first sentence of § 19.36(c)(2) cross-references § 19.36(a), which makes agency prepared documents subject to the same evidentiary standards as those that are applicable to non-agency prepared documents. Moreover, the same types of agency prepared documents tend to be introduced into evidence in every case. These documents, such as examination reports, rarely give rise to authentication issues, and the Agencies feel that requiring a sponsoring witness for such documents needlessly consumes judicial resource and impedes the hearing process. Therefore, no change has been made in this provision.

(11) A commenter suggested that, under § 19.39(b)(2), a party should be able to raise a new legal argument in the exceptions filed to an administrative law judge's recommended decision and that the Agency Head should not be precluded from considering such an argument.

The Agencies agree with the commenter that the Agency Head should have the discretion to determine whether a new argument that is raised for the first time in the exceptions should be considered, even if the party had a prior opportunity to make the argument. For example, the Agency Head should have the discretion to consider whether a new argument has important legal and policy implications which warrant its consideration. Accordingly, the language of § 19.39(b)(2) is amended to read that "No exception *need* be considered * * *" [emphasis added]

However, the Agencies do not believe that the Agency Head should, in effect, be required to consider new arguments raised for the first time in the exceptions. Such a provision could encourage careless or even deceptive pleading. Generally, a party should be permitted to submit a new argument only if there was no previous opportunity to present the argument, *e.g.*, a relevant court decision has been issued in the interim since the filing of the recommended decision.

D. Additional Modifications to the Uniform and Local Rules

In conjunction with the other financial institutions regulatory agencies, the OCC is amending the Uniform Rules to replace generic definitional terms with terms specifically applicable to the OCC and its operations. Thus, the OCC is replacing the terms "Agency Head" and "Agency" with "Comptroller" and "OCC," and is restricting the "scope" provision to those statutes subject to OCC jurisdiction. Further conforming changes have been made to the definitions of Local Rules, Uniform Rules, and OFIA. Each of the other Agencies has made similar changes.

The purpose of these changes is to make the Uniform Rules easier to understand and use. These changes do not affect the substance of the Uniform Rules.

The OCC is making various other minor technical and conforming changes to the Uniform and Local Rules to

improve the clarity and consistency of the rules, including the following.

To ensure consistency of administration, § 19.161(c), which provides for waiver of hearing if an applicant fails to file an answer or a request for hearing on a change-in-bank-control disapproval, has been amended to provide the same procedures as in § 19.19(c) of the Uniform Rules.

Section 19.170 has been amended to clarify that discovery depositions may be taken only in formal administrative actions instituted under subpart A or other actions subject to the procedures of subpart A. Discovery depositions may not be taken in informal administrative actions under subparts C and D which are not subject to the rules in subpart A.

To reflect the changes made in subparts A and H concerning change-in-bank-control proceedings, technical amendments to 12 CFR 5.50 (Change in bank control) will be made in a separate final rule.

E. Immediate Effective Date

The Comptroller is adopting this regulation effective upon publication in the **Federal Register**, without the usual 30-day delay of effectiveness provided for in the APA, 5 U.S.C. 553. While the APA requires publication of a substantive regulation not less than 30 days before its effective date, the delayed effective date requirement may be waived for "good cause."

Good cause for the waiver of the 30-day requirement may be found if the delayed effective date is "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). See *Central Lincoln Peoples' Utility Dist.* v. *Johnson*, 735 F.2d 1101, 1117 (9th Cir. 1984). The necessity for compliance with a statutorily prescribed time limit can also contribute to a finding of good cause. See *Philadelphia Citizens in Action* v. *Schweiker*, 669 F.2d 877, 881–888 (3rd Cir. 1982). In the present case, the implementation of a delayed effective date would impair the ability of the Agencies to comply with the statutory mandate in section 916 of FIRREA and would be impracticable and contrary to the public interest.

Section 916 of FIRREA contains a dual mandate from Congress to the five agencies to (1) establish their own pool of administrative law judges and (2) to develop Uniform Rules and procedures for administrative hearings "[b]efore the close of the 24-month period beginning on the date of the enactment of this Act [August 9, 1989]." In order to properly address these two requirements, the Uniform Rules and the administrative law judge pool should be implemented in a coordinated and harmonious fashion. If the pool is established prior to the rules, the administrative law judges may be required to adjudicate some cases under prior regulations before the Uniform Rules are effective. The result would be confusion for parties and a lack of uniformity in adjudication directly contrary to the purpose of section 916. It would, therefore, be impracticable and contrary to the public interest to delay the effective date for implementation of the Uniform Rules.

F. Applicability of Revised Rules to Enforcement Proceedings

Part 19, as revised by this final rule, applies to any proceeding that is commenced by the issuance of a notice on or after August 9, 1991. The former version of Part 19 applies to any proceeding commenced prior to August 9, 1991 unless, with the consent of the presiding officer, the parties agree to have the proceeding governed by revised Part 19.

G. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, the OCC certifies that this final rule is not expected to have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

This rule implements section 916 of FIRREA which requires the Federal banking agencies and the NCUA to develop a set of uniform rules and procedures for administrative hearings. The purpose of the OCC's revised regulation is to secure a just and orderly determination of administrative proceedings. Because the OCC already has in place rules of practice and procedure, this final rule imposes only minor burdens on all institutions, regardless of size.

H. Executive Order 12291

The OCC has determined that this final rule does not constitute a "major rule" within the meaning of Executive Order 12291 and Treasury Department Guidelines. Accordingly, a Regulatory Impact Analysis is not required on the grounds that this final rule (1) will not have an annual effect on the economy of $100 million or more, (2) will not result in a major increase in the cost of financial institution operations or governmental supervision, and (3) will not have a significant adverse effect on competition (foreign and domestic), employment, investment, productivity or innovation, within the meaning of the executive order.

This final rule implements section 916 of FIRREA which requires the Federal banking agencies and the NCUA to develop a set of uniform rules and procedures for administrative hearings. Because the OCC already has in place rules of practice and procedure, this final rule should result in no significant additional burden for regulated institutions. The final rule would not have a significant impact on competition or impose other significant economic burdens.

List of Subjects in 12 CFR Part 19

Administrative practice and procedure, Crime, Ex parte communications, Hearing procedure, Investigations, National banks, Penalties, Securities.

Authority and Issuance

For the reasons set out in the common preamble, part 19 of chapter I of title 12 of the Code of Federal Regulations, is revised to read as follows:

PART 19—RULES OF PRACTICE AND PROCEDURE

Subpart A—Uniform Rules of Practice and Procedure

Sec.

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 504, 505, 1817, 1818, 1820, 1972, 3102, 3108(a), and 3909; 15 U.S.C. 78*l*(h) and (i), 78o–4(c), 78o–5, 78q–l, 78u, 78u–2, 78u–3, and 78w; and 31 U.S.C. 330.

Subpart A—Uniform Rules of Practice and Procedure

§ 19.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record after opportunity for a hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act ("FDIA") (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Office of the Comptroller of the Currency ("OCC") should issue an order to approve or disapprove a person's proposed acquisition of an institution;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78o–5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the OCC is the appropriate agency;

(e) Assessment of civil money penalties by the OCC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate agency for any violation of:

(1) Any provision of law referenced in 12 U.S.C. 93, or any regulation issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 93;

(2) Sections 22 and 23 of the Federal Reserve Act ("FRA"), or any regulation issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 504 and 505;

(3) Section 106(b) of the Bank Holding Company Amendments of 1970, pursuant to 12 U.S.C. 1972(2)(F);

(4) Any provision of the Change in Bank Control Act of 1978 or any regulation or order issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(5) Any provision of the International Lending Supervision Act of 1983 ("ILSA"), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3909;

(6) Any provision of the International Banking Act of 1978 ("IBA"), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3108;

(7) Section 5211 of the Revised Statutes (12 U.S.C. 161), pursuant to 12 U.S.C. 164;

(8) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u–2);

(9) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") (12 U.S.C. 3349), or any order or regulation issued thereunder; and

(10) The terms of any final or temporary order issued under section 8 of the FDIA or any written agreement executed by the OCC, the terms of any condition imposed in writing by the OCC in connection with the grant of an application or request, certain unsafe or unsound practices, breaches of fiduciary duty, or any law or regulation not otherwise provided herein, pursuant to 12 U.S.C. 1818(i)(2);

(f) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

§ 19.2 Rules of construction.

For purposes of this part:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate;

(c) The term *counsel* includes a non-attorney representative; and

(d) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 19.3 Definitions.

For purposes of this part, unless explicitly stated to the contrary:

(a) *Administrative law judge* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Comptroller* means the Comptroller of the Currency or a person delegated to perform the functions of the Comptroller of the Currency under this part.

(d) *Decisional employee* means any member of the Comptroller's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Comptroller or the administrative law judge, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(e) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the OCC in an adjudicatory proceeding.

(f) *Final order* means an order issued by the Comptroller with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

(g) *Institution* includes any national bank, District of Columbia bank, or Federal branch or agency of a foreign bank.

(h) *Institution-affiliated party* means any institution- affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(i) *Local Rules* means those rules promulgated by the OCC in the subparts of this part excluding subpart A.

(j) *OCC* means the Office of the Comptroller of the Currency.

(k) *OFIA* means the Office of Financial Institution Adjudication, the executive body charged with overseeing the administration of administrative enforcement proceedings for the OCC, the Board of Governors of the Federal Reserve System ("Board of Governors"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA").

(l) *Party* means the OCC and any person named as a party in any notice.

(m) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity or organization, including an institution as defined in paragraph (g) of this section.

(n) *Respondent* means any party other than the OCC.

(o) *Uniform Rules* means those rules in subpart A of this part that are common to the OCC, the Board of Governors, the FDIC, the OTS, and the NCUA.

(p) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

§ 19.4 Authority of the Comptroller.

The Comptroller may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 19.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of Chapter 5 of Title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas duces tecum, and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold schedule and/or pre-hearing conferences as set forth in § 19.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Comptroller shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Comptroller a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 19.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the OCC or an administrative law judge*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the OCC if such attorney is not currently suspended or debarred from practice before the OCC.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer, director, or employee is not currently suspended or debarred from practice before the OCC.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the OCC, file a notice of appearance with OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. Such notice of appearance shall include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel thereby agrees, and represents that he or she is authorized, to accept service on behalf of the represented party.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 19.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: the counsel or party has read the filing or

submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 19.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or a party and an institution to which notice of the proceeding must be given, counsel must certify in writing at the time of filing the notice of appearance required by § 19.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party or institution;

(2) That each such party or institution has advised its counsel that to its knowledge there is no existing or anticipated material conflict between its interests and the interests of others represented by the same counsel or his or her firm; and

(3) That each such party or institution waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 19.9 Ex parte communications.

(a) *Definition*—(1) *Ex parte communication* means any material oral or written communication concerning the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) A party, his or her counsel, or another person interested in the proceeding; and

(ii) The administrative law judge handling that proceeding, the Comptroller, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an ex parte communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Comptroller until the date that the Comptroller issues his or her final decision pursuant to § 19.40(c), no party, interested person or counsel therefor shall knowingly make or cause to be made an ex parte communication concerning the merits of the proceeding to the Comptroller, the administrative law judge, or a decisional employee. The Comptroller, administrative law judge, or decisional employee shall not knowingly make or cause to be made to a party, or any interested person or counsel therefor, an ex parte communication relevant to the merits of a proceeding.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the administrative law judge, the Comptroller or any other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the ex parte communication, to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions.* Any party or his or her counsel who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Comptroller or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

§ 19.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 19.25 and 19.26, shall be filed with OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Comptroller or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Comptroller or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section.

(c) *Formal requirements as to papers filed*—(1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 8½×11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 19.7.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the OCC and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Comptroller or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 19.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the

proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 19.10(c).

(c) *By the Comptroller or the administrative law judge.*—(1) All papers required to be served by the Comptroller or the administrative law judge upon a party who has appeared in the proceeding in accordance with § 19.6 shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 19.6, the Comptroller or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) By delivery to a person of suitable age and discretion at the party's residence;

(iii) By registered or certified mail addressed to the party's last known address; or

(iv) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made by personal service, by delivery to an agent, by delivery to a person of suitable age and discretion at the subpoenaed person's residence, by registered or certified mail addressed to the person's last known address, or in such other manner as is reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

§ 19.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event from which the designated period of time begins to run is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time, except that, when the time period within which an act is to be performed is ten days or less, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express Mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection;

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Comptroller or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered or certified mail, add three days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one day to the prescribed period;

(3) If service is made by electronic media transmission, add one day to the prescribed period, unless otherwise determined by the Comptroller or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

§ 19.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Comptroller pursuant to § 19.38, the Comptroller may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party after notice and opportunity to respond is afforded all non-moving parties or on the Comptroller's or the administrative law judge's own motion.

§ 19.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or depositions shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the OCC is the party requesting the subpoena. The OCC shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the OCC.

§ 19.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any OCC representative other than Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 19.16 OCC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the OCC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the OCC to conduct or continue any form of investigation authorized by law.

§ 19.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other

failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 19.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA, 12 U.S.C. 1817(j)(4), a proceeding governed by this subpart is commenced by issuance of a notice by the Comptroller.

(ii) The notice must be served by the Comptroller upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Comptroller.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the OCC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing shall be filed with OFIA.

§ 19.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*— (1) *Effect of failure to answer.* Failure of a reepondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Comptroller based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 19.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding by leave of the administrative law judge. Such leave will be freely given. The respondent shall answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Comptroller or administrative law judge orders otherwise for good cause shown.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may allow the notice or answer to be amended. The administrative law judge will do so freely when the determination of the merits of the action is served thereby and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 19.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the notice.

§ 19.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 19.23 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law

judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, except that following the filing of the recommended decision, motions must be filed with the Comptroller.

(d) *Responses.* (1) Except as otherwise provided herein, within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Comptroller, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 19.29 and 19.30.

§ 19.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Parties to proceedings under this subpart may obtain document discovery through the production of documents, including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form.

(2) Discovery by use of deposition is governed by subpart I of this part.

(b) *Relevance.* Parties may obtain document discovery regarding any matter, not privileged, which has material relevance to the merits of the pending action. It is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to discovery of admissible evidence. The request may not be unreasonable, oppressive, excessive in scope or unduly burdensome.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph.

§ 19.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents which are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business and shall be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents are to be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If more than 250 pages of copying is requested, the requesting party shall pay for copying, unless the parties agree otherwise, at the current per-page copying rate imposed by the OCC's rules in Part 4 of this chapter implementing the Freedom of Information Act (5 U.S.C. 552a) plus the cost of shipping.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 19.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and § 19.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, all documents withheld on the grounds of privilege must be reasonably identified, together with a statement of the basis for the assertion of privilege.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 19.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, is unreasonable, unduly burdensome, excessive in scope, repetitive of previous requests or seeks to obtain privileged documents, he or she may modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to revoke or limit discovery or to compel production shall not be a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district

court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the administrative law judge against a party who fails to produce subpoenaed documents.

§ 19.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 19.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 19.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

§ 19.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge for the issuance of a subpoena, including a subpoena duces tecum, requiring the attendance of the witness at a deposition. The administrative law judge may issue a deposition subpoena under this section upon showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with

any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(3) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 19.28 Interlocutory review.

(a) *General rule.* The Comptroller may review a ruling of the administrative law judge prior to the certification of the record to the Comptroller only in accordance with the procedures set forth in this section and § 19.23.

(b) *Scope of review.* The Comptroller may exercise interlocutory review of a ruling of the administrative law judge if the Comptroller finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 19.23. Any party may file a response to a request for interlocutory review in accordance with § 19.23(d). Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Comptroller for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Comptroller under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Comptroller.

§ 19.29 Summary disposition.

(a) *In general.* The administrative law judge shall recommend that the Comptroller issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Comptroller. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 19.30 Partial summary disposition.

If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 19.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a "scheduling conference." The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion may

require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at his or her expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 19.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) Effect of failure to comply. No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 19.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the Comptroller, in his or her discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA [12 U.S.C. 1817(j)(4)], within 20 days from service of the hearing order, any respondent may file with the Comptroller a request for a private hearing, and any party may file a pleading in reply to such a request. Such requests and replies are governed by § 19.23. Failure to file a request or a reply is deemed a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 19.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena duces tecum requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at such hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia or as otherwise provided by law at any designated place where the hearing is being conducted.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, such applications may be made orally on the record before the administrative law judge. The party making the application shall serve a copy of the application and the proposed subpoena on every other party to the proceeding.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 19.26(c).

§ 19.35 Conduct of hearings.

(a) *General rules.* (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) Order of hearing. Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the administrative law judge shall fix the order.

(3) Stipulations. Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The transcript shall be made available to any party upon payment of the cost thereof. The administrative law judge shall have authority to order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion. The administrative law judge shall serve notice upon all parties that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed.

§ 19.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of

Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or the Comptroller shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by an appropriate Federal financial institutions regulatory agency or by a state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Comptroller.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 19.37 Proposed findings and conclusions.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days after the parties have received notice that the transcript has been filed with the administrative law judge, unless otherwise ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 19.38 Recommended decision and filing of record.

Within 45 days after expiration of the time allowed for filing reply briefs under § 19.37(b), the administrative law judge shall file with and certify to the Comptroller for decision the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

§ 19.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 19.38, a party may file with the Comptroller written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Comptroller if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each

exception, and the legal authority relied upon to support each exception.

§ 19.40 Review by the Comptroller.

(a) *Notice of submission to the Comptroller.* When the Comptroller determines that the record in the proceeding is complete, the Comptroller shall serve notice upon the parties that the proceeding has been submitted to the Comptroller for final decision.

(b) *Oral argument before the Comptroller.* Upon the initiative of the Comptroller or on the written request of any party filed with the Comptroller within the time for filing exceptions, the Comptroller may order and hear oral argument on the recommended findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Comptroller's final decision. Oral argument before the Comptroller must be on the record.

(c) *Comptroller's final decision.* (1) Decisional employees may advise and assist the Comptroller in the consideration and disposition of the case. The final decision of the Comptroller will be based upon review of the entire record of the proceeding, except that the Comptroller may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Comptroller shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Comptroller orders that the action or any aspect thereof be remanded to the administrative law judge for further proceedings. Copies of the final decision and order of the Comptroller shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Comptroller or required by statute, upon any appropriate state or Federal supervisory authority.

§ 19.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the Comptroller may not, unless specifically ordered by the Comptroller or a reviewing court, operate as a stay of any order issued by the Comptroller. The Comptroller may, in his or her discretion, and on such terms as he or she finds just, stay the effectiveness of all or any part of an order pending a final decision on a petition for review of that order.

Subpart B—Procedural Rules for OCC Adjudications

§ 19.100 Scope.

All materials required to be filed with or referred to the Comptroller or the administrative law judge in any proceedings under this part must be filed with the Hearing Clerk, Office of the Comptroller of the Currency, Washington, DC 20219. Filings to be made with the Hearing Clerk include the notice and answer; motions and responses to motions; briefs; the record filed by the administrative law judge after the issuance of a recommended decision; the recommended decision filed by the administrative law judge following a motion for summary disposition; referrals by the administrative law judge of motions for interlocutory review; exceptions and requests for oral argument; and any other papers required to be filed with the Comptroller or the administrative law judge under this part.

§ 19.101 Delegation to OFIA.

Unless otherwise ordered by the Comptroller, administrative adjudications subject to subpart A of this part shall be conducted by an administrative law judge assigned to OFIA.

Subpart C—Removals, Suspensions, and Prohibitions When a Crime Is Charged or a Conviction Is Obtained

§ 19.110 Scope.

This subpart applies to informal hearings afforded to any institution-affiliated party who has been suspended or removed from office or prohibited from further participation in bank affairs by a notice or order issued by the Comptroller.

§ 19.111 Suspension or removal.

The Comptroller may serve a notice of suspension or order of removal or prohibition on an institution-affiliated party. A copy of such notice or order will be served on the bank, whereupon the institution-affiliated party involved must immediately cease service to the bank or participation in the affairs of the bank. The notice or order will indicate the basis for suspension, removal or prohibition and will inform the institution-affiliated party of the right to request in writing, to be received by the OCC within 30 days from the date that the institution-affiliated party was served with such notice or order, an opportunity to show at an informal hearing that continued service to or participation in the conduct of the affairs of the bank does not, or is not likely to, pose a threat to the interest of the bank's depositors or threaten to impair public confidence in the bank. The written request must be sent by certified mail to, or served personally with a signed receipt on, the District Administrator in the OCC district in which the bank in question is located, or to the Deputy Comptroller for Multinational Banking, Office of the Comptroller of the Currency, Washington, DC 20219, if the bank is supervised by the Multinational Banking Department. The request must state specifically the relief desired and the grounds on which that relief is based.

§ 19.112 Informal hearing.

(a) *Issuance of hearing order.* After receipt of a request for hearing, the District Administrator or the Deputy Comptroller for Multinational Banking, whichever is appropriate, shall notify the petitioner requesting the hearing and the OCC's Enforcement and Compliance Division of the date, time, and place fixed for the hearing. The hearing will be scheduled to be held not later than 30 days from the date when a request for hearing is received unless the time is extended at the written request of the petitioner. The District Administrator or the Deputy Comptroller for Multinational Banking, whichever is appropriate, shall extend the hearing date only for a specific period of time and shall take appropriate action to ensure that the hearing is not unduly delayed.

(b) *Appointment of presiding officer.* The Comptroller shall appoint one or more OCC employees as the presiding officer to conduct the hearing. The presiding officer(s) shall not have been involved in the proceeding, a factually related proceeding or the underlying enforcement action in a prosecutorial or investigative role. The OCC's Enforcement and Compliance Division shall appoint an attorney to represent the OCC at the hearing.

(c) *Waiver of oral hearing.* The petitioner may elect to have the matter determined by the presiding officer solely on the basis of written submissions. The petitioner must present the submissions to the presiding officer not later than ten days prior to the hearing, or within such shorter time period as the presiding officer permits, along with a signed document waiving the statutory right to appear and make oral argument.

(d) *Hearing procedures*—(1) *Conduct of hearing.* Hearings under this subpart are not subject to the provisions of

subpart A of this part or the adjudicative provisions of the Administrative Procedure Act (5 U.S.C. 554–557).

(2) *Powers of the presiding officer.* The presiding officer shall determine all procedural issues that are governed by this subpart. The presiding officer may also permit or limit the number of witnesses and impose time limitations as he or she deems reasonable. The informal hearing will not be governed by the formal rules of evidence. All oral presentations, when permitted, and documents deemed by the presiding officer to be relevant and material to the proceeding and not unduly repetitious will be considered. The presiding officer may ask questions of any person participating in the hearing and may make any rulings reasonably necessary to facilitate the effective and efficient operation of the hearing.

(3) *Presentation.* (i) The petitioner may appear personally or through counsel at the hearing to present relevant written materials and oral argument. Copies of affidavits, memoranda, or other written material to be presented at the hearing must be provided to the presiding officer and to the other parties in the oral argument not later than ten days prior to the hearing or within such shorter time period as permitted by the presiding officer.

(ii) If the petitioner or the appointed OCC attorney desires to present oral testimony or witnesses at the hearing, he or she must file a written request with the presiding officer not later than ten days prior to the hearing, or within a shorter time period as permitted by the presiding officer. The names of proposed witnesses should be included, along with the general nature of the expected testimony, and the reasons why oral testimony is necessary. The presiding officer generally will not admit oral testimony or witnesses unless a specific and compelling need is demonstrated. Witnesses, if admitted, shall be sworn.

(iii) In deciding on any suspension, the presiding officer shall not consider the ultimate question of the guilt or innocence of the individual with respect to the criminal charges which are outstanding. In deciding on any removal, the presiding officer shall not consider challenges to or efforts to impeach the validity of the conviction. The presiding officer may consider facts in either situation, however, which show the nature of the events on which the indictment or conviction was based.

(4) *Record.* A transcript of the proceedings may be taken if the petitioner requests a transcript and agrees to pay all expenses or if the presiding officer determines that the nature of the case warrants a transcript. The presiding officer may order the record to be kept open for a reasonable period following the hearing, not to exceed five business days, to permit the petitioner or the appointed OCC attorney to submit additional documents for the record. Thereafter, no further submissions may be accepted except for good cause shown.

§ 19.113 Recommended and final decisions.

(a) The presiding officer shall issue a recommended decision to the Comptroller and shall serve promptly a copy of the decision on the parties to the proceeding. The decision shall include a summary of the facts and arguments of the parties. Within ten days of service, parties may submit to the Comptroller comments on the presiding officer's recommended decision.

(b) Within 60 days following the hearing or receipt of the petitioner's written submission, the Comptroller shall notify the petitioner by registered mail as to whether the suspension or removal from office, and prohibition from participation in any manner in the affairs of the bank, will be affirmed, terminated or modified. The Comptroller's decision must include a statement of reasons supporting the decision. The Comptroller's decision is a final and unappealable order.

(c) A finding of not guilty or other disposition of the charge on which a notice of suspension was based does not preclude the Comptroller from thereafter instituting removal proceedings pursuant to section 8(e) of the FDIA (12 U.S.C. 1818(e)) and subpart: A of this part.

(d) A removal or prohibition by order remains in effect until terminated by the Comptroller. A suspension or prohibition by notice remains in effect until the criminal charge is disposed of or until terminated by the Comptroller.

(e) A suspended or removed individual may petition the Comptroller to reconsider the decision any time after the expiration of a 12-month period from the date of the decision, but no petition for reconsideration may be made within 12 months of a previous petition. The petition must state specifically the relief sought and the grounds therefor, and may be accompanied by a supporting memorandum and any other documentation the petitioner wishes to have considered. No hearing need be granted on the petition for reconsideration.

Subpart D—Exemption Hearings Under Section 12(h) of the Securities Exchange Act of 1934

§ 19.120 Scope.

The rules in this subpart apply to informal hearings that may be held by the Comptroller to determine whether, pursuant to authority in sections 12 (h) and (i) of the Exchange Act (15 U.S.C. 78/ (h) and (i)), to exempt in whole or in part an issuer or a class of issuers from the provisions of section 12(g), or from section 13 or 14 of the Exchange Act (15 U.S.C. 78/(g), 78m or 78n), or whether to exempt from section 16 of the Exchange Act (15 U.S.C. 78p) any officer, director, or beneficial owner of securities of an issuer. The only issuers covered by this subpart are banks whose securities are registered pursuant to section 12(g) of the Exchange Act (15 U.S.C. 78/(g)). The Comptroller may deny an application for exemption without a hearing.

§ 19.121 Application for exemption.

An issuer or an individual (officer, director or shareholder) may submit a written application for an exemption order to the Securities and Corporate Practices Division, Office of the Comptroller of the Currency, Washington, DC 20219. The application must specify the type of exemption sought and the reasons therefor, including an explanation of why an exemption would not be inconsistent with the public interest or the protection of investors. The Securities and Corporate Practices Division shall inform the applicant in writing whether a hearing will be held to consider the matter.

§ 19.122 Newspaper notice.

Upon being informed that an application will be considered at a hearing, the applicant shall publish a notice one time in a newspaper of general circulation in the community where the issuer's main office is located. The notice must state: the name and title of any individual applicants; the type of exemption sought; the fact that a hearing will be held; and a statement that interested persons may submit to the Securities and Corporate Practices Division, Office of the Comptroller of the Currency, Washington, DC 20219, within 30 days from the date of the newspaper notice, written comments concerning the application and a written request for an opportunity to be heard. The applicant shall promptly furnish a copy of the notice to the Securities and Corporate Practices Division, and to bank shareholders.

§ 19.123 Informal hearing.

(a) *Conduct of proceeding.* The adjudicative provisions of the Administrative Procedure Act, formal rules of evidence and subpart A of this part do not apply to hearings conducted under this subpart, except as provided in § 19.100(b).

(b) *Notice of hearing.* Following the comment period, the Comptroller shall send a notice which fixes a date, time and place for hearing to each applicant and to any person who has requested an opportunity to be heard.

(c) *Presiding officer.* The Comptroller shall designate a presiding officer to conduct the hearing. The presiding officer shall determine all procedural questions not governed by this subpart and may limit the number of witnesses and impose time and presentation limitations as are deemed reasonable. At the conclusion of the informal hearing, the presiding officer shall issue a recommended decision to the Comptroller as to whether the exemption should issue. The decision shall include a summary of the facts and arguments of the parties.

(d) *Attendance.* The applicant and any person who has requested an opportunity to be heard may attend the hearing, with or without counsel. The hearing shall be open to the public. In addition, the applicant and any other hearing participant may introduce oral testimony through such witnesses as the presiding officer shall permit.

(e) *Order of presentation.* (1) The applicant may present an opening statement of a length decided by the presiding officer. Then each of the hearing participants, or one among them selected with the approval of the presiding officer, may present an opening statement. The opening statement should summarize concisely what the applicant and each participant intends to show.

(2) The applicant shall have an opportunity to make an oral presentation of facts and materials or submit written materials for the record. One or more of the hearing participants may make an oral presentation or a written submission.

(3) After the above presentations, the applicant, followed by one or more of the hearing participants, may make concise summary statements reviewing their position.

(f) *Witnesses.* The obtaining and use of witnesses is the responsibility of the parties afforded the hearing. All witnesses shall be present on their own volition, but any person appearing as a witness may be questioned by each applicant, any hearing participant, and the presiding officer. Witnesses shall be sworn unless otherwise directed by the presiding officer.

(g) *Evidence.* The presiding officer may exclude data or materials deemed to be improper or irrelevant. Formal rules of evidence do not apply. Documentary material must be of a size consistent with ease of handling and filing. The presiding officer may determine the number of copies that must be furnished for purposes of the hearing.

(h) *Transcript.* A transcript of each proceeding will be arranged by the OCC, with all expenses, including the furnishing of a copy to the presiding officer, being borne by the applicant.

§ 19.124 Decision of the Comptroller.

Following the conclusion of the hearing and the submission of the record and the presiding officer's recommended decision to the Comptroller for decision, the Comptroller shall notify the applicant and all persons who have so requested in writing of the final disposition of the application. Exemptions granted must be in the form of an order which specifies the type of exemption granted and its terms and conditions.

Subpart E—Disciplinary Proceedings Involving the Federal Securities Laws

§ 19.130 Scope.

(a) Except as provided in this subpart, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in sections 15B(c)(5), 15C(c)(2)(A), 17A(c)(3), and 17A(c)(4)(C) of the Exchange Act (15 U.S.C. 78o–4(c)(5), 78o–5(c)(2)(A), 78q–1(c)(3)(A), and 78q–1(c)(4)(C)), to take disciplinary action against the following:

(1) A bank which is a municipal securities dealer, or any person associated or seeking to become associated with such a municipal securities dealer;

(2) A bank which is a government securities broker or dealer, or any person associated with such government securities broker or dealer; or

(3) A bank which is a transfer agent, or any person associated or seeking to become associated with such transfer agent.

(b) In addition to the issuance of disciplinary orders after opportunity for hearing, the Comptroller or the Comptroller's delegate may issue and serve any notices and temporary or permanent cease-and-desist orders and take any actions that are authorized by section 8 of the FDIA (12 U.S.C. 1818), sections 15B(c)(5), 15C(c)(2)(B), and 17A(d)(2) of the Exchange Act, and other subparts of this part against the following:

(1) The parties listed in paragraph (a) of this section; and

(2) A bank which is a clearing agency.

(c) Nothing in this subpart impairs the powers conferred on the Comptroller by other provisions of law.

§ 19.131 Notice of charges and answer.

(a) Proceedings are commenced when the Comptroller serves a notice of charges on a bank or associated person. The notice must indicate the type of disciplinary action being contemplated and the grounds therefor, and fix a date, time and place for hearing. The hearing must be set for a date at least 30 days after service of the notice. A party served with a notice of charges may file an answer as prescribed in § 19.19. Any party who fails to appear at a hearing personally or by a duly authorized representative shall be deemed to have consented to the issuance of a disciplinary order.

(b) All proceedings under this subpart must be commenced, and the notice of charges must be filed, on a public basis, unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), a request for a private hearing may be filed within 20 days of service of the notice.

§ 19.132 Disciplinary orders.

(a) In the event of consent, or if on the record filed by the administrative law judge, the Comptroller finds that any act or omission or violation specified in the notice of charges has been established, the Comptroller may serve on the bank or persons concerned a disciplinary order, as provided in the Exchange Act. The order may:

(1) Censure, limit the activities, functions or operations, or suspend or revoke the registration of a bank which is a municipal securities dealer;

(2) Censure, suspend or bar any person associated or seeking to become associated with a municipal securities dealer;

(3) Censure, limit the activities, functions or operations, or suspend or bar a bank which is a government securities broker or dealer;

(4) Censure, limit the activities, functions or operations, or suspend or bar any person associated with a government securities broker or dealer;

(5) Deny registration to, limit the activities, functions, or operations or suspend or revoke the registration of a bank which is a transfer agent; or

(6) Censure or limit the activities or functions, or suspend or bar, any person

associated or seeking to become associated with a transfer agent.

(b) A disciplinary order is effective when served on the party or parties involved and remains effective and enforceable until it is stayed, modified, terminated, or set aside by action of the Comptroller or a reviewing court.

Subpart F—Civil Money Penalty Authority Under the Securities Laws

§ 19.140 Scope.

(a) Except as provided in this subpart, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in section 21B of the Exchange Act (15 U.S.C. 78u–2), in proceedings commenced pursuant to sections 15B, 15C, and 17A of the Exchange Act (15 U.S.C. 78o–4, 78o–5, or 78q–1) for which the OCC is the appropriate regulatory agency under section 3(a)(34) of the Exchange Act (15 U.S.C. 78c(a)(34)), the Comptroller may impose a civil money penalty against the following:

(1) A bank which is a municipal securities dealer, or any person associated or seeking to become associated with such a municipal securities dealer;

(2) A bank which is a government securities broker or dealer, or any person associated with such government securities broker or dealer; or

(3) A bank which is a transfer agent, or any person associated or seeking to become associated with such transfer agent.

(b) All proceedings under this subpart must be commenced, and the notice of assessment must be filed, on a public basis, unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), any request for a private hearing must be filed within 20 days of service of the notice.

Subpart G—Cease-and-Desist Authority Under the Securities Laws

§ 19.150 Scope.

(a) Except as provided in this subpart, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in sections 12(i) and 21C of the Exchange Act (15 U.S.C. 78*l*(i) and 78u–3), the Comptroller may initiate cease-and-desist proceedings against a national bank for violations of sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act or regulations or rules issued thereunder (15 U.S.C. 78*l*, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p).

(b) All proceedings under this subpart must be commenced, and the notice of charges must be filed, on a public basis, unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), any request for a private hearing must be filed within 20 days of service of the notice.

Subpart H—Change in Bank Control

§ 19.160 Scope.

(a) Section 7(j) of the FDIA (12 U.S.C. 1817(j)) provides that no person may acquire control of an insured depository institution unless the appropriate Federal bank regulatory agency has been given prior written notice of the proposed acquisition. If, after investigating and soliciting comment on the proposed acquisition, the agency decides that the acquisition should be disapproved, the agency shall notify the acquiring party in writing within three days of the decision. The party can then request an agency hearing on the proposed acquisition. The OCC's procedures for reviewing notices of proposed acquisitions in change-in-control proceedings are set forth in § 5.50 of this chapter.

(b) Unless otherwise provided in this subpart, the rules in subpart A of this part set forth the procedures applicable to requests for OCC hearings.

§ 19.161 Hearing request and answer.

(a) *Hearing request.* The OCC's written disapproval of a proposed acquisition of control of a national bank, must:

(1) Contain a statement of the basis for the disapproval; and

(2) Indicate that—

(i) A hearing may be requested by filing a written request with the Comptroller within ten days after service of the notice of disapproval; and

(ii) If a hearing is requested, that an answer to the notice of disapproval must be filed within 20 days after service of the notice of disapproval.

(b) *Answer.* An answer to the notice of disapproval must specifically deny those portions of the notice of disapproval which are disputed. Those portions of the notice which are not specifically denied are deemed admitted by the applicant. Any hearing under this subpart shall be limited to those portions of the notice that are specifically denied.

(c) *Default—(1) Effect of failure to answer.* Failure of an applicant to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Comptroller based upon an applicant's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of disapproval constitutes a final and unappealable order.

§ 19.162 Hearing order.

Upon receipt of a request for hearing and an answer pursuant to § 19.161, the Comptroller or the Comptroller's designee shall issue an order setting forth the legal authority for the OCC's jurisdiction over the proceeding and shall address the request for hearing.

Subpart I—Discovery Depositions and Subpoenas

§ 19.170 Discovery depositions.

(a) *General rule.* In any proceeding instituted under or subject to the provisions of subpart A of this part, a party may take the deposition of an expert, or of a person, including another party, who has direct knowledge of matters that are non-privileged, relevant, and material to the proceeding, and where there is need for the deposition. The deposition of experts shall be limited to those experts who are expected to testify at the hearing.

(b) *Notice.* A party desiring to take a deposition shall give reasonable notice in writing to the deponent and to every other party to the proceeding. The notice must state the time and place for taking the deposition, and the name and address of the person to be deposed.

(c) *Time limits.* A party may take depositions at any time after the commencement of the proceeding, but no later than ten days before the scheduled hearing date, except with permission of the administrative law judge for good cause shown.

(d) *Conduct of the deposition.* The witness shall be duly sworn, and each party shall have the right to examine the witness with respect to all non-privileged, relevant, and material matters of which the witness has factual, direct, and personal knowledge. Objections to questions or exhibits shall be in short form, stating the grounds for the objection. Failure to object to questions or exhibits is not a waiver except where the grounds for the

objection might have been avoided if the objection had been timely presented. The court reporter shall transcribe or otherwise record the witness's testimony, as agreed among the parties.

(e) *Protective orders.* At any time after notice of a deposition has been given, a party may file a motion for the issuance of a protective order. Such protective order may prohibit, terminate, or limit the scope or manner of the taking of a deposition. The administrative law judge shall grant such protective order upon a showing of sufficient grounds, including that the deposition:

(1) Is unreasonable, oppressive, excessive in scope, or unduly burdensome;

(2) Involves privileged, irrelevant, or immaterial matters;

(3) Involves unwarranted attempts to pry into a party's preparation for trial; or

(4) Is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the witness.

(f) *Fees.* Deposition witnesses, including expert witnesses, shall be paid the same expenses in the same manner as are paid witnesses in the district courts of the United States in proceedings in which the United States is a party. Expenses in accordance with this paragraph shall be paid by the party seeking to take the deposition.

§ 19.171 Deposition subpoenas.

(a) *Issuance.* At the request of a party, the administrative law judge shall issue a subpoena requiring the attendance of a witness at a discovery deposition under paragraph (a) of this section. The attendance of a witness may be required from any place in any state or territory that is subject to the jurisdiction of the United States or as otherwise permitted by law.

(b) *Service.* The party requesting the subpoena shall serve it on the person named therein, or on that person's counsel, by personal service, certified mail, or overnight delivery service. The party serving the subpoena shall file proof of service with the administrative law judge.

(c) *Motion to quash.* A person named in a subpoena may file a motion to quash or modify the subpoena. A statement of the reasons for the motion must accompany it and a copy of the motion must be served on the party which requested the subpoena. The motion must be made prior to the time for compliance specified in the subpoena and not more than ten days after the date of service of the subpoena, or if the subpoena is served within 15 days of the hearing, within five days after the date of service.

(d) *Enforcement of deposition subpoena.* Enforcement of a deposition subpoena shall be in accordance with the procedures of § 19.27(d).

Subpart J—Formal Investigations

§ 19.180 Scope.

This subpart and § 19.8 apply to formal investigations initiated by order of the Comptroller or the Comptroller's delegate and pertain to the exercise of powers specified in 12 U.S.C. 481, 1818(n) and 1820(c), and section 21 of the Exchange Act (15 U.S.C. 78u). This subpart does not restrict or in any way affect the authority of the Comptroller to conduct examinations into the affairs or ownership of banks and their affiliates.

§ 19.181 Confidentiality of formal investigations.

Information or documents obtained in the course of a formal investigation are confidential and may be disclosed only in accordance with the provisions of part 4 of this chapter.

§ 19.182 Order to conduct a formal investigation.

A formal investigation begins with the issuance of an order signed by the Comptroller or the Comptroller's delegate. The order must designate the person or persons who will conduct the investigation. Such persons are authorized, among other things, to issue subpoenas duces tecum, to administer oaths, and receive affirmations as to any matter under investigation by the Comptroller. Upon application and for good cause shown, the Comptroller may limit, modify, or withdraw the order at any stage of the proceedings.

§ 19.183 Rights of witnesses.

(a) Any person who is compelled or requested to furnish testimony, documentary evidence, or other information with respect to any matter under formal investigation shall, on request, be shown the order initiating the investigation.

(b) Any person who, in a formal investigation, is compelled to appear and testify, or who appears and testifies by request or permission of the Comptroller, may be accompanied, represented, and advised by counsel. The right to be accompanied, represented, and advised by counsel means the right of a person testifying to have an attorney present at all times while testifying and to have the attorney—

(1) Advise the person before, during and after the conclusion of testimony;

(2) Question the person briefly at the conclusion of testimony to clarify any of the answers given; and

(3) Make summary notes during the testimony solely for the use of the person.

(c) Any person who has given or will give testimony and counsel representing the person may be excluded from the proceedings during the taking of testimony of any other witness.

(d) Any person who is compelled to give testimony is entitled to inspect any transcript that has been made of the testimony but may not obtain a copy if the Comptroller's representatives conducting the proceedings have cause to believe that the contents should not be disclosed pending completion of the investigation.

(e) Any designated representative conducting an investigative proceeding shall report to the Comptroller any instances where a person has been guilty of dilatory, obstructionist or insubordinate conduct during the course of the proceeding or any other instance involving a violation of this part. The Comptroller may take such action as the circumstances warrant, including exclusion of the offending individual or individuals from participation in the proceedings.

§ 19.184 Service of subpoena and payment of witness fees.

A subpoena may be served on the person named therein, or such person's attorney, by personal service or certified mail. A witness who is subpoenaed will be paid the same expenses in the same manner as witnesses in the district courts of the United States. The expenses need not be tendered at the time a subpoena is served.

Subpart K—Parties and Representational Practice Before OCC; Standards of Conduct

§ 19.290 Scope.

This subpart contains rules relating to parties and representational practice before the OCC. This subpart includes the imposition of sanctions by the administrative law judge, any other presiding officer appointed pursuant to subparts C and D of this part, or the Comptroller against parties or their counsel in an adjudicatory proceeding under this part. This subpart also covers other disciplinary sanctions—censure, suspension or debarment—against individuals who appear before the OCC in a representational capacity either in an adjudicatory proceeding under this part or in any other matters connected with presentations to the OCC relating

to a client's rights, privileges, or liabilities. This representation includes, but is not limited to, the practice of attorneys and accountants. Employees of the OCC are not subject to disciplinary proceedings under this subpart.

§ 19.191 Definitions.

As used in §§ 19.190 through 19.201, the following terms shall have the meaning given in this section unless the context otherwise requires:

(a) *Practice before the OCC* includes any matters connected with presentations to the OCC or any of its officers or employees relating to a client's rights, privileges or liabilities under laws or regulations administered by the OCC. Such matters include, but are not limited to, representation of a client in an adjudicatory proceeding under this part; the preparation of any statement, opinion or other paper or document by an attorney, accountant, or other licensed professional which is filed with, or submitted to, the OCC, on behalf of another person in, or in connection with, any application, notification, report or document; the representation of a person at conferences, hearings and meetings; and the transaction of other business before the OCC on behalf of another person. The term "practice before the OCC" does not include work prepared for a bank solely at its request for use in the ordinary course of its business.

(b) *Attorney* means any individual who is a member in good standing of the bar of the highest court of any state, possession, territory, commonwealth, of the United States or the District of Columbia.

(c) *Accountant* means any individual who is duly qualified to practice as a certified public accountant or a public accountant in any state, possession, territory, commonwealth of the United States, or the District of Columbia.

§ 19.192 Sanctions relating to conduct in an adjudicatory proceeding.

(a) *General rule.* Appropriate sanctions may be imposed when any party or person representing a party in an adjudicatory proceeding under this part has failed to comply with an applicable statute, regulation, or order, and that failure to comply:

(1) Constitutes contemptuous conduct;

(2) Materially injures or prejudices another party in terms of substantive injury, incurring additional expenses including attorney's fees, prejudicial delay, or otherwise;

(3) Is a clear and unexcused violation of an applicable statute, regulation, or order; or

(4) Unduly delays the proceeding.

(b) *Sanctions.* Sanctions which may be imposed include any one or more of the following:

(1) Issuing an order against the party;

(2) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(3) Precluding the party from contesting specific issues or findings;

(4) Precluding the party from offering certain evidence or from challenging or contesting certain evidence offered by another party;

(5) Precluding the party from making a late filing or conditioning a late filing on any terms that are just; and

(6) Assessing reasonable expenses, including attorney's fees, incurred by any other party as a result of the improper action or failure to act.

(c) *Procedure for imposition of sanctions.* (1) Upon the motion of any party, or on his or her own motion, the administrative law judge or other presiding officer may impose sanctions in accordance with this section. The administrative law judge or other presiding officer shall submit to the Comptroller for final ruling any sanction entering a final order that determines the case on the merits.

(2) No sanction authorized by this section, other than refusal to accept late filings, shall be imposed without prior notice to all parties and an opportunity for any party against whom sanctions would be imposed to be heard. Such opportunity to be heard may be on such notice, and the response may be in such form as the administrative law judge or other presiding officer directs. The administrative law judge or other presiding officer may limit the opportunity to be heard to an opportunity of a party or a party's representative to respond orally immediately after the act or inaction covered by this section is noted by the administrative law judge or other presiding officer.

(3) Requests for the imposition of sanctions by any party, and the imposition of sanctions, are subject to interlocutory review pursuant to § 19.25 in the same manner as any other ruling.

(d) *Section not exclusive.* Nothing in this section shall be read as precluding the administrative law judge or other presiding officer or the Comptroller from taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation.

§ 19.193 Censure, suspension or debarment.

The Comptroller may censure an individual or suspend or debar such individual from practice before the OCC if he or she is incompetent in representing a client's rights or interest in a significant matter before the OCC; or engages, or has engaged, in disreputable conduct; or refuses to comply with the rules and regulations in this part; or with intent to defraud in any manner, willfully and knowingly deceives, misleads, or threatens any client or prospective client. The suspension or debarment of an individual may be initiated only upon a finding by the Comptroller that the basis for the disciplinary action is sufficiently egregious.

§ 19.194 Eligibility of attorneys and accountants to practice.

(a) *Attorneys.* Any attorney who is qualified to practice as an attorney and is not currently under suspension or debarment pursuant to this subpart may practice before the OCC.

(b) *Accountants.* Any accountant who is qualified to practice as a certified public accountant or public accountant and is not currently under suspension or debarment by the OCC may practice before the OCC.

§ 19.195 Incompetence.

Incompetence in the representation of a client's rights and interests in a significant matter before the OCC is grounds for suspension or debarment. The term "incompetence" encompasses conduct that reflects a lack of the knowledge, judgment and skill that a professional would ordinarily and reasonably be expected to exercise in adequately representing the rights and interests of a client. Such conduct includes, but is not limited to:

(a) Handling a matter which the individual knows or should know that he or she is not competent to handle, without associating with a professional who is competent to handle such matter.

(b) Handling a matter without adequate preparation under the circumstances.

(c) Neglect in a matter entrusted to him or her.

§ 19.196 Disreputable conduct.

Disreputable conduct for which an individual may be censured, debarred or suspended from practice before the OCC includes, but is not limited to:

(a) Willfully violating or willfully aiding and abetting the violation of any provision of the Federal banking or applicable securities laws or the rules and regulations thereunder or conviction of any offense involving dishonesty or breach of trust.

(b) Knowingly giving false or misleading information, or participating

in any way in the giving of false information to the OCC or any officer or employee thereof, or to any tribunal authorized to pass upon matters administered by the OCC in connection with any matter pending or likely to be pending before it. The term "information" includes facts or other statements contained in testimony, financial statements, applications for enrollment, affidavits, declarations, or any other document or written or oral statement.

(c) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the OCC by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of advantage or by the bestowing of any gift, favor, or thing of value.

(d) Disbarment or suspension from practice as an attorney, or debarment or suspension from practice as a certified public accountant or public accountant, by any duly constituted authority of any state, possession, or commonwealth of the United States, or the District of Columbia for the conviction of a felony or misdemeanor involving moral turpitude in matters relating to the supervisory responsibilities of the OCC, where the conviction has not been reversed on appeal.

(e) Knowingly aiding or abetting another individual to practice before the OCC during that individual's period of suspension, debarment, or ineligibility.

(f) Contemptuous conduct in connection with practice before the OCC, and knowingly making false accusations and statements, or circulating or publishing malicious or libelous matter.

(g) Suspension or debarment from practice before the Board of Governors, the FDIC, the OTS, the Securities and Exchange Commission, the Commodity Futures Trading Commission, or any other Federal agency based on matters relating to the supervisory responsibilities of the OCC.

(h) Willful violation of any of the regulations contained in this part.

§ 19.197 Initiation of disciplinary proceeding.

(a) *Receipt of information.* An individual, including any employee of the OCC, who has reason to believe that an individual practicing before the OCC in a representative capacity has engaged in any conduct that would serve as a basis for censure, suspension or debarment under § 19.192, may make a report thereof and forward it to the OCC or to such person as may be delegated responsibility for such matters by the Comptroller.

(b) *Censure without formal proceeding.* Upon receipt of information regarding an individual's qualification to practice before the OCC, the Comptroller or the Comptroller's delegate may, after giving the individual notice and opportunity to respond, censure such individual.

(c) *Institution of formal disciplinary proceeding.* When the Comptroller has reason to believe that any individual who practices before the OCC in a representative capacity has engaged in conduct that would serve as a basis for censure, suspension or debarment under § 19.192, the Comptroller may, after giving the individual notice and opportunity to respond, institute a formal disciplinary proceeding against such individual. The proceeding will be conducted pursuant to § 19.99 and initiated by a complaint which names the individual as a respondent and is signed by the Comptroller or the Comptroller's delegate. Except in cases of willfulness, or when time, the nature of the proceeding, or the public interest do not permit, a proceeding under this section may not be commenced until the respondent has been informed, in writing, of the facts or conduct which warrant institution of a proceeding and the respondent has been accorded the opportunity to comply with all lawful requirements or take whatever action may be necessary to remedy the conduct that is the basis for the commencement of the proceeding.

§ 19.198 Conferences.

(a) *General.* The Comptroller may confer with a proposed respondent concerning allegations of misconduct or other grounds for censure, debarment or suspension, regardless of whether a proceeding for debarment or suspension has been commenced. If a conference results in a stipulation in connection with a proceeding in which the individual is the respondent, the stipulation may be entered in the record at the request of either party to the proceeding.

(b) *Resignation or voluntary suspension.* In order to avoid the institution of, or a decision in, a debarment or suspension proceeding, a person who practices before the OCC may consent to suspension from practice. At the discretion of the Comptroller, the individual may be suspended or debarred in accordance with the consent offered.

§ 19.199 Proceedings under this subpart.

Any hearing held under this subpart is held before an administrative law judge pursuant to procedures set forth in subpart A of this part. The Comptroller or the Comptroller's delegate shall appoint a person to represent the OCC in the hearing. Any person having prior involvement in the matter which is the basis for the suspension or debarment proceeding is disqualified from representing the OCC in the hearing. The hearing will be closed to the public unless the Comptroller on his or her own initiative, or on the request of a party, otherwise directs. The administrative law judge shall issue a recommended decision to the Comptroller who shall issue the final decision and order. The Comptroller may censure, debar or suspend an individual, or take such other disciplinary action as the Comptroller deems appropriate.

§ 19.200 Effect of suspension, debarment or censure.

(a) *Debarment.* If the final order against the respondent is for debarment, the individual may not practice before the OCC unless otherwise permitted to do so by the Comptroller.

(b) *Suspension.* If the final order against the respondent is for suspension, the individual may not practice before the OCC during the period of suspension.

(c) *Censure.* If the final order against the respondent is for censure, the individual may be permitted to practice before the OCC, but such individual's future representations may be subject to conditions designed to promote high standards of conduct. If a written letter of censure is issued, a copy will be maintained in the OCC's files.

(d) *Notice of debarment or suspension.* Upon the issuance of a final order for suspension or debarment, the Comptroller shall give notice of the order to appropriate officers and employees of the OCC and to interested departments and agencies of the Federal government. The Comptroller or the Comptroller's delegate shall also give notice to the appropriate authorities of the state in which any debarred or suspended individual is or was licensed to practice.

§ 19.201 Petition or reinstatement.

At the expiration of the period of time designated in the order of debarment, the Comptroller may entertain a petition for reinstatement from any person debarred from practice before the OCC. The Comptroller may grant reinstatement only if satisfied that the petitioner is likely to act in accordance with the regulations in this part, and that granting reinstatement would not be contrary to the public interest. Any

request for reinstatement shall be limited to written submissions unless the Comptroller, in his or her discretion, affords the petitioner a hearing.

Subpart L—Equal Access to Justice Act

§ 19.210 Scope.

The Equal Access to Justice Act regulations applicable to formal OCC adjudicatory proceedings under this part are set forth at 31 CFR part 6.

Dated: August 5, 1991.

Robert L. Clarke,

Comptroller of the Currency.

[FR Doc. 91-18364 Filed 8-8-91; 8:45 am]

BILLING CODE 4810-33-M